87-1926

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

UPPER DARBY TOWNSHIP, UPPER DARBY TOWNSHIP POLICE DEPARTMENT, DIANE MILLER, Ind. and as POLICE OFFICER-MATRON OF UPPER DARBY TOWNSHIP, MARTIN KERNS, as POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP and JAMES J. WARD, as MAYOR OF UPPER DARBY TOWNSHIP,
Petitioners

v.

SUE ANN COLBURN, Administratrix of the Estate of MELINDA LEE STIERHEIM, Deceased,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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160 pp.

QUESTIONS PRESENTED

1. Whether a conclusory allegation of "deliberate indifference to medical needs" of a detainee, absent identification of either the purported medical needs or the acts or omissions which evidenced deliberate indifference, states a claim against municipal officials under 42 U.S.C. §1983?

2. Whether an allegation that municipal officials were grossly negligent for a custom of inadequately monitoring jail cells for potential suicides states a claim under 42 U.S.C. §1983?

3. Whether the Court of Appeals erred when it considered allegations outside the Complaint in deciding an appeal of the grant of a Motion under F.R.C.P. 12(b)(6)?

THE PARTIES

All parties appear in the caption of the case in the Court.

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Upper Darby Township, Upper Darby Township Police Department, Diane Miller, Ind. and as Police Officer-Matron of Upper Darby Township, Martin Kerns, as Police Commissioner of Upper Darby Township and James J. Ward, as Mayor of Upper Darby

Township (hereinafter "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinions pertinent to this Petition are the Order of the United States District Court for the Eastern District of Pennsylvania granting the 12(b)(6) Motion (A-63), the Opinion of the District Court denying respondent's Motion for Reconsideration (A-58), the January 26, 1988 Opinion of the United States Court of Appeals for the Third Circuit, 838 F.2d 663 (3d Cir. 1988) (A-1) and the February 22, 1988 Opinion of the Court of Appeals denying Petition for Rehearing En Banc.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on January 26, 1988. A Petition for Rehearing En Banc was filed on February 9, 1988 and denied on February 22, 1988.

The Supreme Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. §§1254(1) and 2101(c), and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following pertinent Constitutional provision is set forth in the Appendix: Fourteenth Amendment to the United States Constitution.

The following pertinent Statute is set forth in the Appendix: 42 U.S.C. §1983.

The following pertinent Federal Rule of Civil Procedure is set forth in the Appendix: F.R.C.P. 12(b)(6).

STATEMENT OF THE CASE

A. Factual Background And District Court Proceedings

Sue Ann Colburn, as the Administratix of the Estate of Melinda Lee Stierheim, brought this action against petitioners, alleging violations of the decedent's Eighth and Fourteenth Amendment rights, recoverable through application of 42 U.S.C. §1983.

Stierheim committed suicide while detained at the Upper Darby Police Station. According to the Complaint, at approximately 5:00 P.M. on April 30, 1985, Stierheim, dressed only in very tight blue denim shorts and a halter top, was taken into custody by the Upper Darby Police for public drunkenness. Prior to placing Stierheim in a jail cell, police matron Diane Miller searched Stierheim. Miller did not find any handgun concealed on Stierheim's person. Approximately four hours later, while in her cell, Stierheim shot herself with a handgun and died early the next morning, becoming the third person to commit suicide while in police custody at the Upper Darby Police Station since November, 1982. The Complaint stated that Miller inadequately searched Stierheim, in that she permitted Stierheim to retain possession of the handgun. There was no allegation that the prior suicides involved handguns or were related to inadequate searches. A body cavity search was not performed on Stierheim because she was detained for a misdemeanor.

In addition to pleading state law tort claims against the petitioners, Colburn also alleged that petitioners' "custom of laxity in supervising and monitoring their jail cells, and also, in searching individuals taken into police custody exhibited gross negligence in their duties and a deliberate indifference to the medical needs of Melinda Lee Stierheim when she was taken into custody" and, therefore, violated Stierheim's civil rights. Colburn also alleged that petitioners knew or should have known that

Stierheim was a suicide risk. The Complaint did not identify the "medical needs" of Stierheim or the acts or omissions of Upper Darby which allegedly constituted deliberate indifference to those medical needs.

In response to the Complaint and during the appropriate time, petitioners filed a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) on various grounds. The Motion to Dismiss was granted by the Honorable James T. Giles of the United States District Court for the Eastern District of Pennsylvania. Colburn subsequently filed a Motion for Reconsideration which contained a Memorandum of Law that set forth additional facts. Colburn stated that she intended to develop and prove these facts through discovery. Colburn never sought leave to amend the Complaint. Judge Giles denied the Motion for Reconsideration.

B. Proceedings in the Court of Appeals

On Appeal to the Third Circuit, Colburn briefed and argued the issue whether the Complaint was sufficient to state an action under §1983 to withstand a 12(b)(6) Motion to Dismiss. Alternatively, Colburn contended that it was error for the District Court to dismiss the Complaint prior to allowing the completion of discovery, and thereafter to permit Colburn to amend her Complaint.

On January 26, 1988, the Court of Appeals affirmed in part and reversed and remanded in part the Order of the District Court. The Court of Appeals ruled that, although the Complaint may not have been sufficient to withstand a 12(b)(6) Motion, it was "more expedient" to consider whether the allegations of the Complaint, together with those contained in Colburn's Memorandum of Law, were sufficient to make out a §1983 claim. This ruling was made despite the fact that Colburn never sought formal leave to amend except until such time as discovery was to have been completed.

Petitioners disagree that the Court of Appeals should have considered any allegations outside of the four corners of the Complaint; however, even the "facts" asserted in the Memorandum are insufficient. These facts as set forth by the Third Circuit are as follows:

> (1) that the Upper Darby police were familiar with Stierheim from previous encounters as a result of her relationship with members of the "Warlocks" motorcycle gang; (2) that on the day before her suicide the Upper Darby police had been called to Stierheim's apartment after Stierheim had jumped from the window following an argument with her boyfriend; (3) that Stierheim was extremely depressed for personal reasons; (4) that Stierheim had obvious scars on her right wrist from a previous suicide attempt; (5) that the detaining officer had to prevent Stierheim from swallowing three Valium pills she had removed from her purse; (6) that Stierheim was detained by the police "for her own protection"; and (7) that Miller found a live round of ammunition in Stierheim's pocket.

Colburn v. Upper Darby Township, 838 F.2d 663, 670 (3d Cir. 1988).

The Third Circuit held that the Complaint, together with the above allegations, was sufficient to state an action against the Township and Township officials in their official capacities who knew or should have known of the particular vulnerability to suicide of a detainee and acted with "reckless indifference" to that vulnerability. This ruling was rendered despite the fact that Colburn had only alleged, both in the Complaint and her Memorandum, that petitioners were grossly negligent in their duties and/or deliberately indifferent to Stierheim's medical needs. It was held that Colburn could state a claim that the Township had a custom of inadequately monitoring its jail cells for potential suicides. The claims

against Miller in both her official and individual capacities were also deemed sufficient.

The Third Circuit affirmed that part of the District Court's Order which dismissed the claim that petitioners failed to adequately train officers in the searching and supervision of detainees, the claims against Police Superintendent Kerns and Mayor Ward in their individual capacities, and Colburn's Eighth Amendment claims.

A Petition for Rehearing En Banc filed by petitioners herein was denied by the Third Circuit. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

SUMMARY: This case presents the novel issue whether there can be municipal liability under §1983 for "gross negligence", and "deliberate indifference to medical needs" of a detainee who commits suicide while incarcerated. The issue is presented in the posture of a 12(b) (6) Motion where plaintiff has pled these conclusory allegations without any facts that could possibly support her contentions.

"Deliberate indifference to serious medical needs" of a prisoner states a §1983 claim if the acts or omissions complained of are "sufficiently harmful". *Estelle v. Gamble,* 429 U.S. 97 (1976). The Complaint in the present case does not specify what, if any, medical needs were required by detainee, let alone "serious" medical needs. Nor is there any identification as to the act or omission which exhibited deliberate indifference with respect to the purported medical needs. Thus, because these elements are unidentified, there is no logical way that petitioners' actions could have been "sufficiently harmful", *Estelle, supra,* or indicative of "obduracy and wantonness", *Whitley v. Albers,* 475 U.S. 312 (1986), to make out a §1983 claim. This case presents a novel application of settled principles of law regarding the

"deliberate indifference" standard, and it has the potential to limit its application in circumstances where a detainee commits suicide while incarcerated. It is an important question of Federal law which should be settled by this Court. Sup. Ct. R. 17.1(c).

Other than the allegation of deliberate indifference to medical needs by Upper Darby officials, there is no other allegation of deliberate indifference in the Complaint. Colburn alleged that, with respect to the searching, monitoring and supervising of its jail cells, Upper Darby was "grossly negligent in its duties". Thus, this case also presents the issue whether a Township can be liable for conduct which amounts to gross negligence if it knew or should have known of the particular vulnerability to suicide of a detainee. In the Complaint, the only factual allegation is that the detainee committed suicide, becoming the third suicide in three years at the Township's jail. There are no other allegations supporting the claim that the Township officials knew or should have known of the detainee's suicidal tendancies. Colburn never argued that this conduct amounted to anything more than gross negligence.

The Court has the opportunity to address the appropriate standard of conduct necessary to plead and prove a §1983 due process claim, *viz.*, whether gross negligence is sufficient. This issue has been reserved by the Supreme Court. *Daniels v. Williams,* 474 U.S. 327 (1986). It is an important question of Federal law which has not been, but should be, settled by the Court. Sup. Ct. R. 17.1(c). The issue is especially important because of the conflict which currently exists between the various Circuit Courts as to whether gross negligence is sufficient. Specifically, the Court of Appeals' decision in the present case is in direct conflict with the Seventh Circuit Opinion in *Campbell v. Greer,* 831 F.2d 700 (7th Cir. 1987) which held that gross negligence is not sufficient to state a §1983 claim.

Finally, certiorari should be allowed because of the Third Circuit's error of law in considering allegations outside of the Complaint in a 12(b) (6) Motion. Because plaintiff never sought leave to amend her Complaint, except until after discovery was to have been completed, it was error for the Court of Appeals to consider allegations not within the four corners of the Complaint, as is mandated by Rule 12(b) (6). The decision of the Court of Appeals was such a departure from the normal course of judicial proceedings so as to call for the Court's power of supervision and this decision is in direct conflict with applicable decisions of this Court. Sup. Ct. R. 17.1(a), (c).

I. A CONCLUSORY ALLEGATION AGAINST A TOWNSHIP OF "DELIBERATE INDIFFERENCE TO MEDICAL NEEDS" OF A DETAINEE IS INSUFFICIENT TO STATE A CLAIM UNDER §1983 WHERE THERE IS NO IDENTIFICATION EITHER OF THE DETAINEE'S MEDICAL NEEDS OR THE ACTS OR OMISSIONS OF TOWNSHIP OFFICIALS WHICH CONSTITUTED DELIBERATE INDIFFERENCE.

The Complaint in this case alleged that the Upper Darby Police exhibited "deliberate indifference to medical needs" of the detainee when she was taken into police custody. However, there are no allegations that detainee requested medical attention or that she displayed signs of injury or need for medical attention. Where there has been no request or no obvious need for medical attention, there can be no constitutional deprivation. *Estelle v. Gamble,* 429 U.S. 97 (1976).

In *Estelle v. Gamble, supra,* the Supreme Court held that, in order to state an Eighth Amendment §1983 claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs". *Id* at 106. As in the case at bar,

the issue was presented to the Court in the context of a Motion by defendants under F.R.C.P. 12(b) (6).

It has also been stated that a detainee's due process rights are at least as great as the protections afforded convicted prisoners under the Eighth and Fourteenth Amendments. *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239 (1983); *Bell v. Wolfish,* 441 U.S. 520 (1979). In *Estelle,* the Complaint sought relief for the lack of diagnosis and inadequate treatment of claimant's back injury by prison hospital officials. The facts as alleged indicated that plaintiff was seen by medical personnel on 17 occasions during a three month period for treatment of various ills. As a matter of principle, the Court stated:

> We, therefore, conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain", [citation omitted], proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, the deliberate indifference to a prisoner's serious illness or injury states a cause of action under §1983.

429 U.S. at 104-105.

However, the Court in *Estelle* held that the conduct complained of by plaintiff in his Complaint, noted above, did not rise to the level of a constitutional violation because "an inadvertent failure to provide adequate medical care" is insufficient to make out a §1983 claim. 429 U.S. at 105.

In *Whitley v. Albers,* 475 U.S. 312 (1986), the Court extended the deliberate indifference standard beyond a prisoner's medical needs and applied it in the context of a prison guard shooting a prisoner during a prison riot.

Justice O'Connor, for the majority, noted that an Eighth Amendment claimant must "*allege* and prove the unnecessary and wanton infliction of pain". *Id.* at 320, in order to establish a viable claim. (Emphasis added). There, a prison security manager ordered an officer to fire a warning shot and to shoot low at any inmate who attempted to thwart a rescue attempt of a prison official held hostage by prisoners. Claimant, a prisoner, was shot by the officer in the left knee as he made a move toward the area where the hostage was being held and brought suit, claiming that the shooting was unnecessary. In upholding a directed verdict for the prison authorities, the Court stated:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited under the Cruel and Unusual Punishments Clause, whether the conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cell block.

Id., 475 U.S. at 319.

In *Daniels v. Williams*, 474 U.S. 327 (1986), the Supreme Court held that an individual instance of negligence on the part of a jailor does not violate the Fourteenth Amendment, reasoning that the Due Process Clause was intended to secure an individual from the arbitrary exercise of the power of the government. There, an inmate of a City jail sought recovery from injuries sustained when he slipped on a pillow left on a stairway by a sheriff's deputy. The Court found that the Due Process Clause protects against arbitrariness and abuse of power as distinguished from negligence or lack of due care. *Id.* at 331-32. *See also, Davidson v. Cannon*, 474 U.S. 344 (1986); *Partridge v. Two Unknown Police Officers of the City of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986).

In the present case, when the allegations contained in the Complaint are measured against the requirements to allege a §1983 action as ennunciated in the above cited Supreme Court decisions, plaintiff's Complaint is deficient.

In *Estelle v. Gamble, supra,* the Court stated that the Complaint must allege acts or omissions *sufficiently harmful* in order to state a §1983 action. 429 U.S. at 106. The focus is not on a result that may have been harmful (in this case, a death), but rather on the "acts or omissions" by the municipal actors. Taken in a light most favorable to Colburn, the alleged harmful omission is identified in the Complaint as a "custom of laxity in supervising and monitoring their jail cell, and also, in searching individuals taken into police custody exhibit-[ing] gross negligence in their duties and a deliberate indifference to the medical needs of Melinda Lee Stierheim when she was taken into police custody". (A-73). The alleged "custom of laxity" is insufficient to make out a §1983 claim based on "deliberate indifference" in these circumstances. *See, City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985).

For example, Colburn alleged that the detainee Stierheim had "medical needs" when she was taken into police custody, not "serious medical needs" as is required under *Estelle.* Although the absence of one word may appear a trivial criticism, it is submitted that, if the medical needs were not serious, then defendants' conduct could not have arisen to a violation of the standard of conduct required by the Fourteenth Amendment, *viz.,* a failure to take note of "medical needs" indicates a lack of due care. *Daniels v. Williams, supra.* If Colburn cannot allege that these medical needs appeared "serious" to defendants, there is no way defendants could have been more than negligent.[1] Moreover, plaintiff's

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1. Parenthetically, neither "medical needs" nor "serious medical needs" would be sufficient under the Civil Rights Act, where

Complaint states as a matter of *fact* that the detainee "was taken into custody by defendant, Upper Darby Township, visibly intoxicated". (A-68). There is no allegation that Stierheim's "medical needs" implicated anything beyond treatment of a visibly intoxicated person. It is stressed that the Complaint states that the indifference took place when Stierheim was taken into custody, and not at any subsequent time.

Certainly, any characterization of petitioners' actions, taken in light most favorable to plaintiff, does not demonstrate "obduracy and wantonness" in failing to supply medical needs. *Whitley v. Albers, supra,* 475 U.S. at 319. As noted above, there was no indication what, if any, were the medical needs. Colburn has not alleged acts which "evidenced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur". *Id.* at 321.

In a decision relied upon by the Court of Appeals, below, the Fifth Circuit in *Partridge v. Two Unknown Police Officers of the City of Houston,* 791 F.2d 1182 (5th Cir. 1986) found that police officials had a duty not to be deliberately indifferent to a pre-trial detainee's serious medical needs where the suicidal tendancies of the detainee were obvious to the officials. There, the Fifth Circuit reversed the District Court's grant of defendants' 12(b)(6) Motion. Because of the similarities, but also crucial distinctions, between the *Partridge* Complaint and the *Colburn* Complaint, a review of the pleadings in each case will be useful. The *Partridge* pleadings indicated the following:

> While being arrested on a suspicion of burglary and theft, the detainee became hysterical; the father of detainee informed an officer at the scene of arrest

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NOTES *(Continued)*
plaintiff is required to simply specifically plead the need itself. *Estelle v. Gamble, supra.*

> that his son had suffered a previous nervous breakdown; the father directed the arresting officers' attention to two medical bracelets which read, "Medical Warning: See Wallet Card" and "Heart Patient", respectively; the officer removed the bracelets and dangled them in front of the father and told him that, if the father obtained a letter from a psychiatrist, the detainee would probably be released; after being forced into a police car, detainee attempted to kick the doors and windows out of the car; detainee intentionally struck his head against the plexiglass divider in the car; arresting officers failed to inform the booking officers of detainee's aberrant behavior; three hours after incarceration, detainee hung himself with a pair of socks tied around the upper bars of his cell.

Id. at 1184.

In an Amended Complaint, plaintiffs in *Partridge* asserted that defendants "engaged in a deliberate pattern of conduct which constituted the policy of the Houston Police Department's jail policy for the handling of detained citizens. . .". *Id.* at 1184. The Fifth Circuit held:

> . . . to the extent that the claim rests on the detention center's deliberate and systematic lack of adequate care for detainees, it alleges the kind of arbitrariness and abuse of power that is preserved as a component of the Due Process Clause in *Daniels*.

Id. at 1187.

As can be seen from a comparison of the facts set forth in the *Colburn* and *Partridge* Complaints, the *Partridge* Complaint, arguably, sets forth "acts or omissions *sufficiently harmful* to evidence deliberate indifference to serious medical needs". *Estelle v. Gamble, supra*, 429 U.S. at 106. The "omissions" which were "sufficiently harmful" in *Partridge* included actual

knowledge on the part of the arresting officer that the detainee had suffered a prior nervous breakdown and had "serious medical needs" as evidenced by two medical bracelets on his arm at the time of the arrest. By way of contrast, in the present case, there is a conclusory allegation that defendants "knew or should have known of detainee's suicidal tendancies", without any *facts* supporting this purported knowledge. Moreover, plaintiff in *Partridge* alleged in the Complaint "a deliberate pattern of conduct"; there is no such allegation in the present case.

In short, Colburn cannot show:

> "A deliberately adopted policy that constituted indifference" and a "deliberate pattern of conduct" amounting to the "kind of arbitrariness and abuse of power that is preserved as a component of the Due Process Clause. . .".

Colburn v. Upper Darby Township, 828 F.2d 633, 678, J. Garth *dissenting*, quoting *Partridge, supra*, 791 F.2d at 1183. It has been held in other contexts that deliberate indifference exists when action is not taken in the face of a "strong likelihood, rather than a mere possibility," that the failure to act would result in harm. *State Bank v. Camic*, 712 F.2d 1140, 1146 (1983), *cert. denied*, 104 S. Ct. 491 (1983).

Moreover, as noted by the dissent, below, the Complaint is "barren of any facts which could give content . . ." to the conclusory allegations of gross negligence and deliberate indifference. *Colburn*, supra, 838 F.2d at 679. Judge Garth further noted:

> The mere inclusion of the word "reckless" or the term "gross negligence" cannot, without more, convert a cause of action in negligence (not sustainable under §1983) into a constitutional cause of action.

Id. at 680.

The Supreme Court in *Daniels, supra,* 474 U.S. at 334-35, addressed the issue of "artful pleading", discussing whether a claimant, mindful of due process standard of conduct pleading requirements, would merely plead the appropriate buzzwords to elevate a negligence action into a constitutional action. Although plaintiff in *Daniels* conceded that defendants in that case were, at most, negligent, *id.*, the Court noted:

> The difference between one end of the spectrum — negligence — and the other — intent — is abundantly clear. See O. Holmes, the Common Law 3 (1923).

Id. at 335.

Implicit in the Court's decisions in §1983 actions is the proposition that the conduct of municipal actors must be characterized by a Court at some point in the litigation, whether in a 12(b)(6) Motion, *Estelle v. Gamble,* a Motion for Summary Judgment, *Daniels v. Williams,* or a Directed Verdict, *Whitley v. Albers.*

In analyzing Colburn's Complaint, it is plain to see that the characterization of defendants' conduct by plaintiff is artful pleading. For instance, when alleging the facts which give rise to the action, plaintiff states that defendants acted "negligently, carelessly and recklessly" (A-70) and defendants are "directly liable and responsible for the negligence of . . . Miller" (A-70) and defendants are "guilty of one or more of the following acts or omissions of negligence . . ." (A-70).

However, it is only under a heading entitled, "Civil Rights Cause of Action", that defendants' acts are then characterized as "gross negligence" and "deliberate indifference" to medical needs. Clearly, the purpose behind the use of the buzzwords is transparent — an attempt to elevate an action in negligence into a constitutional violation.

II. CONDUCT AMOUNTING TO GROSS NEGLIGENCE FOR A CUSTOM OF INADEQUATELY MONITORING JAIL CELLS FOR POTENTIAL SUICIDES FAILS TO RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION IN A DUE PROCESS §1983 CLAIM.

In *Whitley v. Albers, supra,* the Court stated:

> We only recently reserved the general question whether something less than intentional conduct, such as recklessness or "gross negligence", is enough to trigger the protections of the Due Process Clause.

475 U.S. at 327, citing *Daniels v. Williams, supra.*

Since the *Whitley* decision, the Supreme Court has yet to rule on whether gross negligence is sufficient to impose liability under §1983. *Cf., City of Springfield v. Kibbe,* 480 U.S. __, 107 S. Ct. 1114, 94 L.Ed. 2d 293 (1987) (certiorari held improvidently granted on procedural grounds in a case where First Circuit held gross negligence was an appropriate standard in §1983 action).

In *Daniels, supra,* the Supreme Court held that more than negligence is required to state a §1983 claim. The Supreme Court stated: "Upon reflection, we agree and overrule *Parratt* to the extent that it states that a mere lack of due care by a State official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." *Id.,* 474 U.S. at 330. The Court continued, stating: "No decision of this Court before *Parratt* supported the view that negligent conduct by a State official, even though causing injury, constitutes a deprivation under the Due Process Clause." *Id.* at 331.

In the companion case of *Davidson v. Cannon,* supra, the Court interpreted its Opinion in *Daniels,* stating:

> In *Daniels*, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing *unintended* injury to life, liberty or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required.

474 U.S. at 347 (emphasis added). The Supreme Court in its Opinion in *Daniels* also specifically stated:

> Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property. (Citations omitted).

Daniels, supra, 474 U.S. at 331 (emphasis by Court).

As is apparent in the Court's Opinion in *Daniels*, there is a line of precedent requiring deliberate action in order to trip the protections of the Due Process Clause. The Supreme Court in *Davidson*, supra, also suggests that an intentional cause is required.

In *Pembaur v. City of Cincinnatti*, 475 U.S. 469 (1986), the Court dealt with a definition of "policy" in reference to a §1983 claim, but also stated:

> We also hold that municipal liability under §1983 attaches where — and only where — a *deliberate choice* to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. (Citation omitted).

Id. at 483 (emphasis added); adding further evidence of a requirement of deliberate action.

It does appear that, at least in dicta, the Supreme Court is leaning towards a more intentional type act to state a due process claim. As recognized by Justice Brennan in his dissent in *Davidson:*

> I agree with the Court that merely negligent conduct by a State official, even though causing personal injury, does not constitute a deprivation of liberty under the Due Process Clause. I do believe, however, that official conduct which causes personal injury due to recklessness or deliberate indifference does deprive the victim of liberty within the meaning of the Fourteenth Amendment.

Davidson v. Cannon, supra, 474 U.S. at 348. As agreed by Justice Brennan, reckless conduct may be enough, but there is no mention of gross negligence. In addition, he apparently attempts to state his difference from the majority opinion which appears to read as requiring deliberate conduct.

In *City of Springfield v. Kibbe, supra,* the Court dismissed a writ of certiorari as improvidently granted without addressing the substantive issue of whether gross negligence in police training is a viable theory of municipal liability. However, Justice O'Connor writing in dissent, stated that inadequate police training "may serve as the basis for §1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the City's domain." *Id.*, 94 L.Ed. 2d at 304.

In the present case, Colburn's allegations that the inadequate search, supervision and monitoring of decedent was the proximate cause of the suicide indicates, at most, simple negligence. Moreover, plaintiff does not allege "reckless disregard," but rather "gross negligence". The Supreme Court should allow certiorari to clarify the issue of whether gross negligence is sufficient to prove a §1983 claim.

III. CERTIORARI SHOULD BE GRANTED BECAUSE OF CONFLICT OF VIEWS BETWEEN THE CIRCUIT COURTS REGARDING THE STANDARD OF CONDUCT NECESSARY TO MAKE OUT A §1983 CLAIM.

As noted above, in *Daniels v. Williams, supra,* the Court ruled that negligence was not enough to establish a §1983 due process claim, but that it was reserving the issue "whether less than intentional contact, such as recklessness or 'gross negligence', is enough to trigger the protections of the Due Process Clause". *Id.*, 474 U.S. at 334, n. 3.

Since the *Daniels* decision, the Supreme Court has not decided the issue of whether actions characterized as "gross negligence" are sufficient to state a §1983 claim against a municipality. See *City of Springfield v. Kibbe, supra.* As a result, a conflict has arisen in the Circuit Courts as to what standard of conduct is actionable under §1983. In *Nishiyama v. Dixon County, Tennessee,* 814 F.2d 277 (6th Cir. 1987), plaintiffs filed a Complaint alleging municipal officials permitted a convicted felon and inmate in the custody of defendants to use a municipal patrol car while alone. He pulled over plaintiffs' decedent, then beat and murdered her. In ruling on a 12(b)(6) Motion, the Sixth Circuit *en banc* stated:

> We believe that the allegation in the present Complaint of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power. The Complaint also pled that the result of this abuse of power was the death of Kathy Nishiyama. These allegations are sufficient to state a claim for a substantive due process violation that would withstand a Motion to Dismiss.

Id., 814 F.2d at 282. *Accord, Vinson v. Campbell County Fiscal Court,* 820 F.2d 194 (6th Cir. 1987) (gross negligence sufficient to state a §1983 claim).

The Sixth Circuit view is in conflict with the Seventh Circuit Opinion in *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987). There, in a due process Eighth Amendment claim, a prisoner was stabbed by other prisoners after the prisoner had asked prison authorities to deadlock his door because of threats from other prisoners. The Seventh Circuit ruled that, although the failure to deadlock the cell may have been gross negligence, such conduct would not give rise to a §1983 claim. The Court stated, "[o]nly if the defendants believed that Campbell was in serious danger and they decided to do nothing would they be liable." *Id.* at 702. The *Campbell* Court approved the following jury instruction:

> In order for plaintiff to prevail, it must be shown that defendants actually intended to deprive him of reasonable protection, or that defendants acted with deliberate indifference to plaintiff's legitimate need for protection. When I use the phrase "deliberate indifference", I mean conduct which intentionally or deliberately or recklessly ignores any person's constitutional rights. Deliberate indifference is established only if there is actual knowledge or impending harm rather than a mere suspicion that plaintiff would be assaulted and [if] the defendants consciously and culpably refused to take steps to prevent this assault.
>
> Mere negligence or inadvertence does not constitute indifference.

Id. at 702. The Seventh Circuit noted that this jury instruction closely followed the standard it announced in *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), which case was quoted with approval by the Supreme Court in *Whitley v. Albers, supra*, 475 U.S. at 321.

The *Campbell* decision clarifies previous uncertainty which existed in the Seventh Circuit itself regarding the

standard of conduct necessary to sustain a §1983 action. See, *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987) (expressing view that because the Seventh Circuit had not rejected gross negligence standard as basis for municipal liability jury instruction regarding gross negligence was not improper).

The First Circuit in *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. dismissed, sub nom. City of Springfield v. Kibbe*, 480 U.S. ____, 107 S. Ct. 1114, 94 L.Ed. 2d 293, held that a municipality's policy which reflected gross negligence in training of its police force was sufficient to state a §1983 claim.

By its decision in *Colburn v. Upper Darby Township*, the Third Circuit encapsulates the uncertainty that exists regarding the appropriate standard of conduct. At one point in its Opinion, the majority expresses its view that gross negligence is sufficient because the Supreme Court did not reverse that part of the Third Circuit's Opinion which discussed gross negligence in *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984), *en banc, affirmed sub nom. Davidson v. Cannon*, 474 U.S. 344 (1986). The dissent in *Colburn* contends that, because *Davidson* involved only a negligence claim, any reference to gross negligence in the Third Circuit *Davidson* Opinion was dicta. Thus, the dissent disputes whether gross negligence is the appropriate standard for municipal liability, particularly where no content is given to these words by the Third Circuit.[2] See dissenting Opinion, 838 F.2d at 679, n. 7.

Indeed, the majority Opinion, perhaps because it is ruling on a "putative Amended Complaint", is unclear as

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2. The *Colburn* dissent also states that the need for a meaningful standard for §1983 claims is paramount where roughly one in six civil cases filed in the Federal Courts in 1986 was a civil rights action. Petitioners agree with the dissent when it notes that litigants and Judges should be furnished with a reliable standard to measure whether a claim can state a violation of the Constitution under §1983.

to whether gross negligence is the appropriate standard in this case. The holding states, if officials "know or should have known of the particular vulnerability to suicide of an inmate, the Fourteenth Amendment imposes on them an obligation not to act with *reckless indifference* to that vulnerability". *Id.* at 669 (emphasis added). The Third Circuit Opinion makes this statement, despite the fact that reckless indifference was never alleged in the Complaint, or the Memorandum of Law to which the Court freely referred.

The Court further revealed its uncertainty:

> We have not yet had occasion to define "gross negligence" or distinguish it from "reckless disregard" or "reckless indifference" in the civil rights context.

Id. at 670.

Despite this admission, the Third Circuit declined to make such a distinction. The majority stated that, when determining what standard of conduct constitutes a violation of the Fourteenth Amendment, it would not "rush in where the Supreme Court has, as yet, declined to tread . . .", but rather "[w]e prefer to adhere to the established principle that Courts should not dash headlong into constitutional pronouncements". *Id.* at 674.

Certiorari should be allowed for the Supreme Court to consider and settle the important issue of what standard of conduct governs municipal liability under §1983.

IV. THE PROPOSED ALLEGATIONS CONTAINED IN COLBURN'S APPELLANT MEMORANDUM OF LAW ARE INSUFFICIENT TO STATE A §1983 ACTION.

The Court of Appeals, after stating that plaintiff's Complaint was insufficient to state a §1983 claim,[3] considered allegations outside the Complaint, which plaintiff contended in her appellate Brief she would be able to prove after discovery. These additional allegations are set forth above in the Statement of the Case. *Colburn v. Upper Darby Township, supra,* 838 F.2d at 670.

The Third Circuit held that these allegations were sufficient to make out a claim that defendants should have known that the detainee was a suicide risk. None of the non-pled allegations refer to a standard of conduct; rather, the allegations are additional facts. It is submitted that the non-pled allegations are still insufficient to state the arbitrariness and abuse of power on the part of municipal actors which is required to make out a §1983 due process claim. *Daniels v. Williams, supra,* 474 U.S. at 331.

It is crucial that none of these non-pled facts refer to the medical needs of Stierheim. Rather, it is asserted that Stierheim was extremely depressed for personal reasons, that she had jumped from a window following an argument with her boyfriend and that she had scars

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3. See, e.g., *Colburn, supra,* 838 F.2d at 670 and 672. The Third Circuit imposes on §1983 claimants the requirement that the "Complaint contain a modicum of specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs", *Ross v. Meagan,* 638 F.2d 646, 650 (3d Cir. 1981), in order to protect "State officials from a deluge of frivolous claims and provid[e] State officials with sufficient notice of the Claims asserted . . .". 838 F.2d at 666. The Third Circuit stated that Colburn's Complaint was inadequate to satisfy the modicum of specificity requirement, prior to holding that facts stated in Colburn's Memorandum contained the necessary factual detail.

on her right wrist from a previous suicide attempt. Neither the Complaint nor the Memorandum states what the police should have done to attend to these alleged medical needs. For instance, there is no allegation that Stierheim needed medical or psychiatric treatment during the four hour period she was detained.

A fortiori, if there were no medical needs required by Stierheim, there can be no "obduracy and wantonness" on the part of the police in refusing to supply medical needs. *Whitley v. Albers, supra,* 475 U.S. at 319.

Clearly, the additional facts in the Memorandum relate to the allegation that the police were grossly negligent in their duties, in that, in the first instance, they failed to adequately search Stierheim to find a dangerous weapon, and, in the second instance, they failed to monitor the jail cells for a potential suicide.[4] Petitioners submit that gross negligence in these circumstances fails to state a §1983 claim. Moreover, assuming arguendo that the police knew of Stierheim's suicidal tendancies, the failure to monitor her jail cell cannot amount to anything more than mere negligence.

Moreover, petitioners agree with the dissent, below, which states, ". . . these allegations fail to specify the allegedly responsible individuals, fail to establish a legal connection between any actor and knowledge held by others, fail to identify the affirmative 'moving force' which might implicate the liability of the police department and the municipality (footnote omitted) . . ." 838 F.2d at 683.

If the Court decides to consider the additional allegations not pled by plaintiffs, it is submitted that said allegations do not rise to the level of a constitutional violation, under either the "deliberate indifference to

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4. The Third Circuit dismissed that part of the Complaint which alleged Upper Darby failed to adequately train their officers and police matrons in proper search techniques.

medical needs" or "gross negligence" in performance of duties standards.

V. THE COURT OF APPEALS ERRED IN CONSIDERING ALLEGATIONS OUTSIDE OF THE COMPLAINT IN DECIDING AN APPEAL OF A GRANT OF A 12(B)(6) MOTION.

The Federal Rules of Civil Procedure allow a defendant the option to respond to a Complaint by filing a Motion to dismiss the Complaint for "failure to state a claim upon which relief can be granted". F.R.C.P. 12(b)(6). In deciding a 12(b)(6) Motion, only the allegations within the four corners of the Complaint may be considered by the District Court or, for that matter, any Court sitting on appeal. See, e.g., *Estelle v. Gamble, supra,* 429 U.S. at 99; *J. M. Mechanical Corp. v. U.S. Department of Housing and Urban Development,* 716 F.2d 190 (3d Cir. 1983). The 12(b)(6) Motion admits the well-pleaded material allegations of the Complaint, *Hospital Building Co. v. Trustees of the Rex Hospital,* 425 U.S. 738 (1976), but denies their legal sufficiency. J. Moore, *Moore's Federal Practice,* 1988 Rules Pamphlet, pp. 139-40.

In the case below, the District Court granted defendants' 12(b)(6) Motion prior to receiving a response to the Motion from plaintiff.[5] However, plaintiff, in her response later received by the District Court, asserted that the Complaint was legally sufficient but also requested alternatively that the Court "permit plaintiff to amend the Complaint *following the completion of discovery*". 838 F.2d at 666 (emphasis supplied). This request

5. Counsel agreed, and the District Court approved, an extension of time to answer defendants' 12(b)(6) Motion. Plaintiff's response was received after the Court had ruled but prior to the expiration of the extension. Plaintiff subsequently filed a Motion for Reconsideration of the District Court's Order, which Motion was denied by the District Court.

by Colburn was made later in her Motion for Reconsideration, as well as on appeal. Colburn also referred to facts outside the Complaint in her response to defendants' 12(b)(6) Motion.

It was not until oral argument on appeal that Colburn asserted that plaintiff was in a position to file an Amended Complaint that would include allegations referred to in plaintiff's Memorandum filed in the District Court in opposition to the 12(b)(6) Motion. However, Colburn never produced an Amended Complaint prior to the Third Circuit Opinion.

In its Opinion, the Court of Appeals stated:

> . . . we need not decide whether the Complaint as originally filed was properly dismissed; it is more *expedient* to consider whether the allegations of the Complaint together with those that counsel has represented plaintiff would make if given leave to amend would state a claim under §1983.

828 F.2d at 667 (emphasis supplied).

By succumbing to "expediency", the Court of Appeals completely emasculated F.R.C.P. 12(b)(6). Although F.R.C.P. 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires", *Foman v. Davis*, 371 U.S. 178, 182 (1962), plaintiff never requested leave to amend from the District Court, except following the completion of discovery. As noted above, factual development by way of discovery is irrelevant to the disposition of the 12(b)(6) Motion; rather, it is the legal sufficiency of the Complaint which is at issue.

A related issue addressed by the Court of Appeals is the burden of counsel to comply with F.R.C.P. 11 which requires a litigant to make "some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the law". *Colburn*, 838 F.2d at 667, citing F.R.C.P. 11 Advisory Committee Notes, 1983 Amendment. The majority expressed concern that plaintiff

would not be able to state a claim in Federal Court, given Rule 11 constraints. However, as the dissent notes, plaintiff is not denied access to the Courts simply because she is unable to plead an action which rises to the level of constitutional deprivation under §1983. *Id.*, 838 F.2d at 681-82. To the contrary, plaintiff has the option to plead an action in negligence in State Court and, if "discovery revealed constitutional abuses, nothing would then prevent the plaintiff's assertion of such cause of action". *Id.*, 838 F.2d at 682. Indeed, in the present case, plaintiff has instituted an action in the Courts of the Commonwealth of Pennsylvania for damages arising out of the facts which give rise to her Complaint in Federal Court.

Simply, the Court of Appeals made a ruling on a non-existent Complaint, in contravention of F.R.C.P. 12(b)(6). The majority conceded at numerous points in its decision that plaintiff's Complaint as constituted was insufficient to make out a §1983 action. *See, e.g., Id.*, 838 F.2d at 670, 672. By ruling on allegations not contained in a Complaint, the Court of Appeals, in effect, drafted a Complaint for plaintiff's counsel. At the very least, the Court of Appeals should have remanded the case to the District Court to allow plaintiff leave to amend. On the other hand, given the fact that plaintiff never sought leave to amend from the District Court, or from the Court of Appeals, except at oral argument, the issue of amending the Complaint was not properly before the Court of Appeals. Moreover, Colburn's "Statement of the Issues Presented" framed the issues on appeal, in pertinent part, as "[w]hether the District Court erred in dismissing appellant's Complaint and not requiring appellees to complete discovery and thereafter to permit appellant to amend her Complaint . . .". (A-82). Quite

simply, in a Motion under 12(b)(6), discovery and facts outside the pleadings are irrelevant.[6]

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6. Although the Advisory Committee Notes to F.R.C.P. 12(b)(6) state that, if "matters outside the pleadings are presented to and not excluded by the Court, the Motion shall be treated as one for summary judgment and disposed of as provided in Rule 56", the Court of Appeals did not address this issue or treat the appeal as anything other than an appeal of a 12(b)(6) Motion. It is notable that the District Court did not consider any facts outside the pleadings as is mandated by 12(b)(6). The issue whether a Court of Appeals may, *sua sponte*, convert a 12(b)(6) Motion to a Rule 56 Motion was not addressed below. In any event, the Court of Appeals never converted this 12(b)(6) Motion into a Rule 56 Motion, despite considering matters outside the pleadings. Rule 56 allows a defendant to submit affidavits, among other things, in support of its Motion. The Court of Appeals never afforded defendants this opportunity.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

GERMAN, GALLAGHER & MURTAGH

By:_____

Dean F. Murtagh
John P. Shusted
Attorneys for Petitioners

APPENDIX

Sue Ann COLBURN, Administratrix of the Estate of Melinda Lee Stierheim, Deceased, Appellant,

v.

UPPER DARBY TOWNSHIP, Upper Darby Township Police Department, Diane Miller, Individually and as Police Officer-Matron of Upper Darby Township, Martin Kerns, Individually and as Police Commissioner of Upper Darby Township, and James J. Ward, Individually and as Mayor of Upper Darby Township.

No. 86-1675.

United States Court of Appeals,
Third Circuit.

Argued May 22, 1987.

Decided Jan. 26, 1988.

Rehearing Denied Feb. 22, 1988.

Estate of detainee who committed suicide brought § 1983 action against township and police officials. The United States District Court for the Eastern District of Pennsylvania, James T. Giles, J., dismissed complaint, and appeal was taken. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) allegation that custodial official knew or should have known that detainee was suicide risk was sufficient to state § 1983 claim against official, and (2) allegation that township has custom of inadequately monitoring jail for potential suicides was sufficient to state cause of action against township and police officials in their official capacity.

Affirmed in part, reversed and remanded in part.

Garth, Circuit Judge, dissented on original submission and on rehearing and filed opinions.

Weis, Hutchinson, Scirica, and Cowen, Circuit Judges would have granted rehearing.

1. Federal Civil Procedure 1788.5

Heightened specificity requirements for § 1983 claims does not alter general standard for ruling on motions to dismiss for failure to state a claim; complaints comply with this standard if they allege specific conduct violating plaintiff's rights, time and place of that conduct, and identity of responsible officials. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

2. Federal Civil Procedure 1837

Section 1983 plaintiff's failure to file formal motion to amend complaint did not, in itself, warrant dismissal of complaint without leave to amend where court granted motion to dismiss prior to receiving plaintiff's timely answer to that motion, which included additional facts which plaintiff was prepared to allege if given permission to amend complaint.

3. Constitutional Law 262

Detainee is entitled under due process clause of Fourteenth Amendment to, at minimum, no less protection for personal security than that afforded convicted prisoners under Fourteenth Amendment and no less level of medical care than that required for convicted prisoners by Eighth Amendment. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 8, 14.

4. Constitutional Law 262

Though custodial officials cannot be placed in position of guaranteeing that inmates will not commit suicide, if such officials know or should know of particular vulnerability to suicide of inmate, then Fourteenth Amendment imposes on them obligation not to act with reckless indifference to that vulnerability. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

5. Civil Rights 13.12(5)

Allegation that township officials should have known pretrial detainee was suicide risk, in that police were familiar with detainee and her suicidal tendencies, was sufficient to state § 1983 claim for denial of due process against custodial officer whose search failed to disclose gun which detainee subsequently used to kill herself. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

6. Civil Rights 13.7

Allegation that township and police department had exhibited custom of laxity regarding supervision and monitoring of jail cells and in searching individuals taken into police custody alleged type of custom sufficient to support municipal liability under § 1983. 42 U.S.C.A. § 1983.

7. Civil Rights 13.12(5)

Allegations that township and police department exhibited custom of laxity in searching individuals taken into police custody and that plaintiff's decedent was third person to commit suicide while in custody at that jail, were sufficient to state § 1983 claim against township and its governing officials in their official capacities, in that prior suicides could be viewed as providing governing body with knowledge of its alleged custom.

8. Civil Rights 13.12(5)

Allegation that township officials failed to adequately train police officers in searching and supervision of detainees failed to state claim for municipal liability under § 1983 where complaint alleged only isolated incident of custodial officer's failure to detect handgun when frisking detainee; there was no allegation of custom or practice evidencing township's alleged failure. 42 U.S.C.A. § 1983.

9. Civil Rights 13.7

Police commissioner and mayor could not be held personally liable in § 1983 action arising out of suicide of detainee absent allegation that either was personally involved in any activity related to detainee's death. 42 U.S.C.A. § 1983.

Joseph R. Pozzuolo, Gary Perkiss (argued), Pozzuolo & Perkiss, Philadelphia, Pa., for appellant.

William F. Holsten, Holsten & White, Media, Pa., for appellees Upper Darby Tp. and James J. Ward, Individually and as Mayor of Upper Darby Tp.

Dean F. Murtagh (argued), German, Gallagher & Murtagh, Philadelphia, Pa., for all appellees.

Before SLOVITER, BECKER and GARTH, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

I.

Issue

This action was filed under 42 U.S.C. § 1983 alleging that the suicide of decedent by a self-inflicted gun wound while she was detained in police custody apparently for public drunkenness was a result of constitutional violations by the officials responsible for her custody and the municipality which employs them. The district court, without permitting amendment, dismissed the complaint. In determining whether the district court erred as a matter of law, we must look once again to our precedent on the extent of factual specificity required in civil rights complaints and on the nature of conduct which constitutes a constitutional deprivation.

II.

Facts

Sue Ann Colburn, the administratrix of the estate of Melinda Lee Stierheim, filed this action against Upper Darby Township (Upper Darby); the Upper Darby police department; Diane Miller, both individually and in her official capacity as an Upper Darby police officer; Martin Kerns, both individually and in his official capacity as Upper Darby police commissioner; and James Ward, both individually and in his official capacity as Upper Darby mayor.

The facts, as set forth in the original complaint, are as follows. At approximately 5:00 p.m. on April 30, 1985, Stierheim, dressed in blue denim shorts and a halter top and "visibly intoxicated", was taken into custody by the Upper Darby police. Before placing Stierheim in a jail cell, Miller, the police matron on duty at the time, searched Stierheim. Miller did not find any handgun concealed on Stierheim's person. Approximately four hours later, while in her cell, Stierheim shot herself with a handgun. Stierheim died later that night, becoming the third person since 1982 to have committed suicide while in Upper Darby police custody.

The complaint alleges that Miller's search and supervision of Stierheim was negligently and/or recklessly performed, that defendants have exhibited a "custom of laxity regarding the supervision and monitoring of their jail cells and in searching individuals taken into police custody," and that defendants' "failure to provide adequate supervision and monitoring of their jail cells and their failure to provide adequate training to police officers-matrons in searching individuals taken into police custody amounts to gross negligence and a deliberate indifference to the safety and lives of individual taken into custody and detained." App. at 8. It is also alleged that defendants "knew or had reason to know from their observation that [Stierheim] was a suicidal

risk." App. at 10. The inadequate search and supervision are alleged to have been the proximate cause of Stierheim's death. Recovery is sought under 42 U.S.C. § 1983 for deprivation of Stierheim's constitutional rights under the Eighth and Fourteenth Amendments.[1]

Defendants moved for dismissal of the complaint. They argued, *inter alia*, that the complaint failed to plead with the requisite factual specificity a constitutional deprivation sufficient to support a due process claim against any of the defendants; that with respect to Kerns and Ward, the complaint failed to allege facts supporting individual liability; that the complaint failed to plead with requisite specificity an official custom or policy sufficient to support municipal liability; and that since Stierheim was not convicted of any crime, she could assert no Eighth Amendment claim.

The district court granted the motion to dismiss without opinion. After the court's order dismissing but within the time allowed by stipulation approved by the court, Colburn filed an answer to the motion to dismiss and a supporting memorandum.[2] Colburn also moved for reconsideration. In the court's opinion denying reconsideration, it explained that it dismissed the section 1983 due process claim against Miller individually because negligent actions cannot produce constitutional deprivations actionable under section 1983, and because "[t]he facts as stated lack sufficient specificity to tie together the allegedly inadequate frisk and the subsequent suicide." App. at 110. Similarly, the court dismissed the section 1983 due process claims against all

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1. The complaint also alleges a state law claim for wrongful death and a state law survival action. The dismissal of the complaint as a whole in federal court was without prejudice to plaintiff's state law claims. Only the dismissal of the section 1983 claim is before us on appeal.

2. The court explained that the stipulation "crossed paths with the motion." App. at 109.

defendants in their official capacities because "[a] conclusory allegation that a municipal police force is lax in carrying out its duties is the exact type of negligent behavior the Supreme Court intended to exclude from the scope of section 1983," and because "[t]he extension of municipal liability to cover unforeseeable and tragic events caused directly by the superseding actions of a third party is beyond the realm of cognizable section 1983 violations." App. at 111. The court also held that the Eighth Amendment was inapplicable since Stierheim was unconvicted.

Colburn appeals from the order that denied her motion for reconsideration and thereby granted defendants' motion to dismiss.

III.

The Pleading Standard

To sustain the dismissal of a complaint under Fed.R.Civ.P. 12(b)(6), " 'we must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff,' and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 506 (3d Cir.1985) (quoting *Helstoski v. Goldstein*, 552 F.2d 564, 565 (3d Cir.1977) (per curiam)). The dual policy concerns of protecting state officials from a deluge of frivolous claims and providing state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings have led us to impose on section 1983 claims the additional pleading requirement that the "complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir.1981); *see also Frazier v. Southeastern Pennsylvania Transportation Authority*,

785 F.2d 65, 67 (3d Cir.1986); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir.1976).

[1] The heightened specificity requirement for section 1983 claims does not alter the general standard for ruling on motions to dismiss under Rule 12(b)(6). *See Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). As we stated in *Frazier*, "the crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." 785 F.2d at 68; *accord District Council 47, American Federation of State, County and Municipal Employees v. Bradley*, 795 F.2d 310, 313 (3d Cir.1986). We have routinely held that complaints comply with this standard if they allege the specific conduct violating the plaintiff's rights, the time and the place of that conduct, and the identity of the responsible officials. *See id.* at 314; *Frazier*, 785 F.2d at 68-70; *Hall v. Pennsylvania State Police*, 570 F.2d 86, 89 (3d Cir.1978). A plaintiff is not required to provide either proof of her claims or "a proffer of all available evidence" because in civil rights cases "much of the evidence can be developed only through discovery" of materials held by defendant officials. *Frazier*, 785 F.2d at 68, *quoted with approval in District Council 47*, 795 F.2d at 313.

Moreover, we have held that "failure to permit amendment of a complaint dismissed for want of specific allegations constitutes an abuse of discretion." *Ross*, 638 F.2d at 650; *see also District Council 47*, 795 F.2d at 316. Of course, the district court need not permit an amendment that would be insufficient to cure the deficiency in the original complaint. *See Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir.1983) (per curiam) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83, S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)); 3 J. Moore, *Moore's Federal Practice* § 15.10, at 15-106 & n. 5 (2d ed. 1985).

[2] A review of the record provides ample explanation why plaintiff did not file a motion to amend her complaint. Defendants filed their motion to dismiss on May 16, 1986. Stipulations between counsel, approved by the court, extended plaintiff's time to answer or otherwise move with respect to defendants' motion to dismiss until June 27, 1986. Nonetheless, by order signed June 23, 1986 and entered June 24, 1986, the district court granted what it termed the "unopposed" motion to dismiss for the reasons stated therein.

On June 27, 1986, within the time of the extension previously approved by the court, plaintiff filed her answer and a forty page memorandum in opposition to the motion to dismiss which referred to additional facts in support of her cause of action. Plaintiff argued, *inter alia*, that the complaint was pled in sufficient detail, but also requested, if necessary, that the court "permit plaintiff to amend the complaint following completion of discovery." App. at 75. Because the court had already dismissed the complaint, plaintiff also filed on the same day a motion for reconsideration of the district court's order.

It might have been preferable for plaintiff to have appended her proposed amended complaint to a motion so that the district court would have had before it the precise allegations that plaintiff was prepared to make. Under the circumstances, and in particular because of the court's premature dismissal order, we do not deem plaintiff's failure to file a formal motion to amend dispositive. We have repeatedly directed the district courts in section 1983 cases to consider proposed amendments, even in the absence of a petition for leave to amend. *See, e.g., Rotolo,* 532 F.2d at 923. As Judge Garth, writing for the court in *District Council,* 47, 795 F.2d at 316, stated: "The fact that [plaintiff] appealed the dismissal of this complaint rather than seeking leave to amend pursuant to Fed.R.Civ. P. 15(a) before the district court should not prejudice the plaintiffs. . . .

[W]e have never required plaintiffs to request leave to amend following a district court's dismissal of a complaint."

Plaintiff's counsel advised us at oral argument that plaintiff is in a position to file an amended complaint that will include allegations referred to in her memorandum filed in the district court. App. at 70-72. Therefore we need not decide whether the complaint as originally filed was properly dismissed; it is more expedient to consider whether the allegations of the complaint together with those that counsel has represented plaintiff would make if given leave to amend would state a claim under section 1983.

In reviewing the sufficiency of civil rights complaints, we cannot avoid noting the difficulty plaintiffs and their counsel may have in attempting to accommodate this court's requirement of factual specificity with amended Fed.R.Civ.P. 11. That rule equates the signature of an attorney or party signing a pleading with a certificate that the pleading "is well grounded in fact," and requires plaintiffs to make "some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the law." Fed.R.Civ.P. 11 Advisory Committee's Notes concerning 1983 Amendment. However, the Advisory Committee has explained that, "[t]he standard is one of reasonableness under the circumstances." *Id.* One of the circumstances to be considered is whether the plaintiff is in a position to know or acquire the relevant factual details. The administratrix in this action is in a particularly difficult position because Stierheim is dead and the results of defendants' investigations into the incident are apparently not a matter of public record. Defendants have not yet responded to plaintiff's interrogatories and her requests for production of documents. We must take factors in consideration in determining whether, at this preliminary stage,

we can hold as a matter of law that plaintiff's allegations cannot reasonably be read to state a claim under section 1983.

IV.

The Requirements of a Section 1983 Claim

Defendants do no dispute that the complaint sufficiently alleges one of the two prerequisites of a section 1983 action, that the conduct complained of must be committed by a person acting under color of state law. Instead they challenge the complaint's sufficiency in alleging the second requirement, that the conduct complained of deprived the plaintiff of a right or privilege secured by the Constitution or the laws of the United States. *See Riley v. Jeffes*, 777 F.2d 143, 145 (3d Cir.1985). They argue that the failure to prevent Stierheim's suicide does not rise to the level of a constitutional violation since they have no obligation "to protect a prisoner from self-destructive behavior." Appellees' Brief at 28. We cannot accept the defendants' argument that a prisoner's suicide can never give rise to a section 1983 violation.

Cases where the injury to the victim is caused by violence from persons other than the defendant officials acting under color of law present difficult issues. In *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12 (3d Cir.1987), we considered whether a section 1983 complaint could be sustained against custodial officials for their allegedly reckless actions in maintaining an insecure jail from which a dangerous prisoner escaped and thereafter murdered nearby residents. In upholding the district court's dismissal of the complaint, we distinguished between the relationship of custodial officials and the general public, at issue in *Russell*, and the relationship of custodial officials and persons in their custody. We held that the escaped prisoner's crime against a member of the general public could not

reasonably be attributed to the custodial officials. *Id.* at 17. On the other hand, we stated that "[a] prisoner is, by virtue of his or her custody, in a special relationship with the custodial authorities and dependent upon them for protection." *Id.* at 16. We continued, "[i]f the authorities recklessly disregard the prisoner's safety, they may be liable under § 1983 for actions performed by another inmate." *Id.*

In our earlier opinion in *Davidson v. O'Lone,* 752 F.2d 817 (3d Cir.1984) (in banc), *aff'd sub nom. Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed. 2d 677 (1986), we considered the claim of a prison inmate who suffered a deprivation of a liberty interest through an attack by another inmate. We reasoned that "[b]ecause an inmate is not free to leave the confines which s/he is forced to share with other prisoners, the state bears the responsibility for the inmate's safety." *Davidson,* 752 F.2d at 821. We stated that liability may be imposed on prison officials, even for assaults which they they did not commit, "if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials." *Id.* at 828. We reaffirmed that where prison officials infringed a liberty interest by intentional conduct, gross negligence, or reckless indifference, or an established state procedure, the matter is actionable under section 1983. *Id.*[3]

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3. Two judges of the six judges who joined the in banc opinion in *Davidson* did not join the reference to "gross negligence". *See* 752 F.2d at 828 n. 8. However, two of the dissenting judges, Judge Gibbons, now Chief Judge, and Judge Higginbotham, would have held that negligence alone stated a claim under section 1983. It thus follows that six of the nine judges who considered that case in banc subscribed to the "gross negligence" standard. It is unreasonable to suggest, as the dissent does, that we cannot infer the adherence of Chief Judge Gibbons and Judge Higginbotham to the in banc court's majority view expressed in *Davidson* that conduct that is grossly negligent or recklessly indifferent is covered by section 1983 just because the dissenter's position that would have

[3] We see no reason not to apply a similar construction of section 1983 when the acts causing the injury are those of the prisoner herself. A detainee is entitled under the Due Process Clause of the Fourteenth Amendment to, at a minimum, no less protection for personal security than that afforded convicted prisoners under Fourteenth Amendment and no less a level of medical care than that required for convicted prisoners by the Eighth Amendment. *See Boring v. Kozakiewicz*, 833 F.2d 468, 471-72 (3d Cir. Nov. 16, 1987); *Norris v. Frame*, 585 F.2d 1183, 1187 (3d Cir.1978); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1079-80 (3d Cir.1976); *see also City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244, 103 S.Ct. 2079, 2983, 77 L.Ed.2d 605 (1983) (detainee's due process rights at least as great as prisoner's Eighth Amendment rights); *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S.Ct. 1861, 1874, 60 L.Ed.2d 447 (1979) (pretrial detainees have additional due process right to freedom from punishment).

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Court held that prison officials were entitled to search inmates and their cells to discover contraband in order to prevent prison violence. The violent behavior referred to included not only prisoners' assaults against prison staff, visitors, and other prisoners, but also prisoners' suicides. In that connection, the Court stated:

> Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self restraint . . . During 1981 and the first half of 1982, . . . there were over 125 suicides in [state and federal prisons].

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gone farther was rejected by the Supreme Court. *See* Dissenting op. at 679 n. 7.

Id. at 526, 104 S.Ct. at 3200. Significant for our purposes is the Court's statement that prison administrators "are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." *id.* at 526-27, 104 S.Ct at 3200-01.

The viability of a section 1983 complaint arising from the suicide of a pretrial detainee was considered in depth in *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182 (5th Cir.1986). In that case a boy who exhibited agitation and aberrant behavior when arrested for burglary and theft and who had previously had a nervous breakdown, a fact communicated to the arresting officer, committed suicide shortly after being placed in solitary confinement. In reversing the dismissal of the complaint, Judge Wisdom, writing for the majority, stated that "the defendants had a duty, at a minimum, not to be deliberately indifferent to [the detainee's] serious medical needs." *Id.* at 1187. He continued:

> A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills. A psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies. And just as a failure to act to save a detainee from suffering from gangrene might violate the duty to provide reasonable medical care absent an intervening legitimate government objective, failure to take any steps to save a suicidal detainee from injuring himself may also constitute a due process violation.

Id. at 1187 (footnotes omitted).

The principal theory of the complaint in *Partridge* was that the boy's death was "caused by the detention center's custom or policy of allowing jail procedures that are callous to the point of deliberate indifference to detainees, especially detainees in need of protection

from injuring themselves or others." *Id.* at 1185. The court held that "to the extent that the claim rests on the detention center's deliberate and systematic lack of adequate care for detainees, it alleges the kind of arbitrariness and abuse of power that is preserved as a component of the due process clause in *Daniels* [*v. Williams*, [474 U.S. 327] 106 S.Ct. 662 [88 L.Ed.2d 662] (1986)]." *Id.* at 1187.

Other courts have similarly sustained the viability of complaints alleging that officials have demonstrated deliberate indifference to detainees' suicidal tendencies. *See Roberts v. City of Troy*, 773 F.2d 720, 724-25 (6th Cir.1985); *Madden v. City of Meriden*, 602 F.Supp. 1160, 1163-64 (D.Conn.1985); *see also Jackson v. Chicago*, 645 F.Supp. 926, 927-28 (N.D.Ill.1986); *Matje v. Leis*, 571 F.Supp. 918, 930 (S.D. Ohio 1983). This court has suggested that such a showing will support section 1983 liability, rejecting a similar claim only because the plaintiffs had failed to prove at trial anything more than negligence on the part of the police officers. *See Patzig v. O'Neil*, 577 F.2d 841, 847-48 (3d Cir.1978).

Defendants rely on two district court cases, *Williams v. City of Lancaster, Pennsylvania*, 639 F.Supp. 377 (E.D. Pa. 1986) and *Grant v. City of Philadelphia*, No. 83-5424 (E.D.Pa. Dec. 5, 1985) [Available on WESTLAW, 1985 WL 4290], where plaintiffs' section 1983 actions based on the suicide of pretrial detainees were unsuccessful. Neither of those cases involved a motion to dismiss the complaint. Instead, both cases were decided on summary judgment following discovery. Thus, for example, based on the material before it on summary judgment, the district court in *Williams* was able to conclude that defendants' action could not be termed more than negligence and that "the officers' failure to seek out medical care cannot be said to be a deliberate or reckless indifference to Williams' health and safety." *Williams*, 639 F.Supp. at 383. A similar conclusion was reached by the same court in *Grant*.

[4] Since the case before us was decided on a motion to dismiss the complaint rather than on a motion for summary judgment, and there has been no discovery, we need not consider whether this court would have decided those cases the same way. Of course we agree that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

In *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 508 (3d Cir.1985), this court further elucidated this issue when we held:

> The allegations of the complaint may fairly be read to allege conduct rising to the level of deliberate indifference, reckless disregard, or gross negligence by the agency and by its supervisory officials fairly attributable to policies and practices of the agency. They allege more than the mere "negligent monitoring of the mother's household," as stated by the dissent. They therefore adequately meet the standard of conduct encompassed by § 1983. *See, e.g. Voutour v. Vitale*, 761 F.2d 812, 820-22, 823 (1st Cir.1985); *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981).

We have not yet had occasion to define "gross negligence" or distinguish it from "reckless disregard" or "reckless indifference" in the civil rights context.[4]

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4. One approach has been suggested in *Doe v. New York City Department of Social Services*, 649 F.2d 134, 143 (2d Cir.1981), where the court said:

> On repeated occasions this court has drawn attention to the close affinity of the concepts, gross negligence and deliberate indifference. . . . One is a type of conduct, and the other a state of mind. Nevertheless, the two are closely associated, such that

Even if we were convinced that there could be a meaningful distinction between these terms for purposes of section 1983 actions, it would be premature to attempt to draw such a fine line at this stage of the proceeding. Since the Supreme Court has recognized the obligation of prison officials to take reasonable measures to guarantee the safety of inmates, our inquiry is merely whether the putative amended complaint can fairly be construed as alleging a violation of that duty sufficient to constitute deprivation of Stierheim's due process rights.

V.

Sufficiency of the Complaint

A.

[5] The complaint in this case alleges that defendants knew or should have known that Stierheim was a suicide risk. App. at 10. While this allegation standing alone may not have met this court's standard for a modicum of factual specificity in civil rights complaints, plaintiff, in her memorandum in opposition to defendants' motion to dismiss in the district court, buttressed her complaint allegation with the following facts which could be asserted in an amended complaint: (1) that the Upper Darby police were familiar with Stierheim from previous encounters as a result of her relationship with members of the "Warlocks" motorcycle gang; (2) that on the day before her suicide the Upper Darby police had been called to Stierheim's apartment after Stierheim had jumped from the window following an argument with her boyfriend; (3) that Stierheim was extremely depressed for personal reasons; (4) that Stierheim had

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gross negligent conduct creates a strong presumption of deliberate indifference.

Id. at 143 (citations and footnote omitted). We take no position on this approach at this time.

obvious scars on her right wrist from a previous suicide attempt; (5) that the detaining officer had to prevent Stierheim from swallowing three Valium pills she had removed from her purse; (6) that Stierheim was detained by the police "for her own protection"; and (7) that Miller found a live round of ammunition in Stierheim's pocket. App. at 70-71.[5]

We cannot conclude that as a matter of law that these allegations are insufficient to state a claim under section 1983 against Miller, the custodial official, in her individual capacity. It does not appear that plaintiff's proposed amended complaint is frivolous, or that such a complaint would give defendants insufficient notice to enable them to file an answer. Plaintiff is therefore entitled to a reasonable amount of discovery to help her make the necessary showing to prove her case. For example, presumably defendants found the gun that killed Stierheim. Discovery could show whether it is conceivable that the gun could have been concealed in a body cavity (which was suggested by defendants at oral argument).

It follows that the district court erred in dismissing the complaint against Miller in her individual capacity without permitting an amendment that sufficiently states a claim under section 1983. The complaint as proposed to be amended is sufficient to withstand a motion to dismiss by Miller.[6]

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5. In considering the sufficiency of the allegations, we do not consider hypothetical possibilities alluded to by plaintiff's counsel that Stierheim may have been shot by another inmate or a guard, or his statement that a subsequent investigation suggested that she had been beaten. Counsel concedes that until given discovery into the circumstances of Stierheim's death, he is unable to make any such allegation in an amended complaint.

6. Judge Becker agrees, given the applicable pleading standard, *see* part III, *supra*, that the panel's decision does not turn on whether Colburn can survive a motion for summary judgment or a directed verdict. Judge Becker notes in his view that, unless gross negligence means something less than "deliberate indifference" or

B.

Defendant Upper Darby Township[7] cannot be held liable in a section 1983 action for its employees' actions solely on the basis of respondeat superior. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691-95, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611 (1978). It can be liable only if the action alleged to be unconstitutional either "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91, 98 S.Ct. at 2035-36.

Even in the absence of formal policymaking activity, "an 'official policy' may be inferred 'from informal acts or omissions of supervisory municipal officials,' " *Estate of Bailey by Oare v. County of York*, 768 F.2d at 506 (quoting *Turpin v. Mailet*, 619 F.2d 196, 200 (2d Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980)), although not from the misconduct of a single low-level officer. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821-24 (plurality opinion), 830-31, 105 S.Ct. 2427, 2435-37 (plurality opinion), 2439-40, 85 L.Ed.2d 791 (Brennan, J., concurring); *see also Bartholomew v. Fischl*, 782 F.2d 1148, 1154 (3d Cir.1986) ("it is possible that a 'single instance' of misconduct *by a*

"reckless disregard," a question left open in *Davidson, v. O'Lone*, 752 F.2d 817, 828 (3d Cir. 1984), Colburn cannot survive a motion for summary judgment or directed verdict without developing, by way of discovery (or proof at trial, facts beyond those set forth in her proposed amended complaint, *see* pp. 670-671, *supra*.

7. We treat Upper Darby Township and named defendant Upper Darby Police Department as one entity. Appellees contend the Police Department is not a "person" subject to liability under section 1983. If plaintiff persists in her suit against that entity, the district court will have to consider whether the Upper Darby Police Department is an appropriate defendant.

policymaking city official could provide the basis for an inference that an official policy existed." (emphasis added)). Moreover, as we stated in *Davidson*, 752 F.2d at 828, "when officials with a responsibility to prevent harm, such as prison officials, fail to establish or execute appropriate procedures for preventing serious malfunctions in the administration of justice, such failure would support a claim under §1983. *See, e.g., Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1980), *cert. dismissed sub. nom. Finley v. Murray*, 456 U.S. 604, 102 S.Ct. 2226, 72 L.Ed.2d 366 (1982)."

[6] Colburn's complaint alleges that Miller, Upper Darby, Ward (the Mayor), the Upper Darby police, and Kerns (the Police Commissioner), "have exhibited a custom of laxity regarding the supervision and monitoring of their jail cells and in searching individuals taken into police custody." App. at 8. The defendants argue that a "custom of laxity" cannot be the type of custom sufficient to support municipal liability under section 1983. Appellees' Brief at 8. To the contrary, we have made clear our position that "an 'official policy' may be inferred 'from informal acts or *omissions* of supervisory municipal officials.' " *Estate of Bailey by Oare v. County of York*, 768 F.2d at 506 (citation omitted) (emphasis added); *see also Wellington v. Daniels*, 717 F.2d 932, 935 (4th Cir.1983).

In *Black v. Stephens*, 662 F.2d 181, 189-91 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 72 L.Ed.2d 475 (1982), it was the failure of the police chief to take certain actions, i.e. delaying disciplinary investigations into conduct of an officer charged with excessive force and failure to file citizens' complaints about excessive force in the officers' permanent personnel file, that provided the basis for the inference of the police chief's "policy of encouraging the use of excessive force." That evidence led us to uphold a jury's finding of

liability against the police chief and the City of Allentown, on the basis of a "governmental policy." In *Partridge v. Two Unknown Police Officers,* 791 F.2d at 1188-89, the Fifth Circuit held that the allegation that the Houston police department "had a custom of inadequate monitoring of suicidal detainees which amounted to a policy of denying them medical care" satisfied the requirements of *Monell.*

[7] In this case plaintiff has done more than merely allege a "custom of laxity" which can be inferred from the "[d]efendants' failure to provide adequate supervision and monitoring of their jail cells". That allegation alone might not satisfy our requirement for a "modicum of factual specificity" in civil rights cases. However, plaintiff has alleged that Stierheim was the third person to commit suicide while in police custody at the Upper Darby Township police department jail since November 1982. App. at 8. The two prior suicides can be viewed as providing the governing body of Upper Darby with actual or constructive knowledge of the alleged custom of inadequate monitoring of jail cells. *See Partridge,* 791 F.2d at 1189. In short, we cannot hold that the complaint provides no basis for finding liability against Upper Darby or its governing officials in their official capacity. Although it may be difficult for plaintiff to prove the " 'nexus between the policy . . . and the infringement of constitutional rights' ", *see Talbert v. Kelly,* 799 F.2d 62, 67 (3d Cir.1986) (quoting *Estate of Bailey by Oare v. County of York,* 768 F.2d at 507), we cannot say at this stage of the proceeding that such a nexus is so implausible that the complaint cannot be maintained. Therefore, the district court erred in dismissing the complaint as to Upper Darby and Miller, Kerns and Ward in their official capacities.

C.

[8] On the other hand, we do not believe that the action can be maintained against defendants on the basis of the broad allegation that they failed to adequately train officers in searching and supervision of detainees. *See* App. at 9. In *Chinchello v. Fenton*, 805 F.2d 126, 134 (3d Cir.1986), we held that allegations regarding a supervisory official's "failure to train, supervise, and discipline" prison officials would not support a claim that the supervisory official's conduct "violate[d] a clearly established constitutional duty." *See also Krisko v. Oswald*, 655 F.Supp. 147, 152 (E.D.Pa.1987) (failure to train police insufficient to support municipal liability for constitutional violation).

We do not suggest that there are no circumstances in which a deficient training policy can form the basis for municipal liability under section 1983. *See, e.g., Voutour v. Vitale*, 761 F.2d 812, 819-22 (1st Cir.1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *Rymer v. Davis*, 754 F.2d 198, 200-01 (6th Cir.), *vacated and remanded in light of City of Oklahoma City v. Tuttle sub nom. City of Shepardsville, Kentucky v. Rymer*, 473 U.S. 901, 105 S.Ct. 3518, 87 L.Ed.2d 646 *reaff'd after remand*, 775 F.2d 756 (6th Cir.1985). Moreover, even the four Justices of the Supreme Court who voted not to dismiss the writ of certiorari in a case where liability of a city had been sustained on the basis of a grossly negligent policy of inadequate training agreed that section 1983 liability against a municipality can be premised on failures to train amounting to "reckless disregard for or deliberate indifference to" individuals' rights. *City of Springfield, Massachusetts v. Kibbe*, ____ U.S. ____, 107 S.Ct. 1114, 1121, 94 L.Ed.2d 293 (1987) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Powell, J., dissenting from dismissal of writ of certiorari to *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir.1985).

However, in *Chinchello* we suggested that at a minimum such liability could be imposed "only where there are both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate." *Id.* at 133 (footnote omitted).

In this case, we distinguish between the allegations that in essence claim that defendants had a custom of inadequately monitoring the jails for potential suicides, which we have sustained at least at this stage of the proceeding, and allegations that they failed to train police officers-matrons, like Miller, in proper search techniques. There is nothing alleged other than the isolated instance of Miller's failure to detect Stierheim's handgun in frisking the scantily clothed Stierheim to support maintaining this action on the basis of inadequate training.[8] Therefore, on remand the district court should strike these allegations unless plaintiff can amend the complaint to satisfy the two-pronged test enunciated in *Chinchello*.

D.

[9] Finally, the complaint contains no allegations that either Kerns or Ward was personally involved in any activity related to Stierheim's death. For this reason, Colburn's claims against Kerns and Ward in their individual capacities were properly dismissed.

VI.

The Dissenting Opinion

It is unproductive to respond to each of the dissent's mischaracterizations of the majority's opinion and legal

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8. The allegation of the two prior suicides does not satisfy the requirement that there have been "a prior pattern of similar incidents" in the absence of any allegation that these suicides were tied to inadequate searches.

precedent.[9] We comment only on the three principal points made by Judge Garth: his stringent fact pleading standard; his exclusion of suicide as a basis for a due process violation; and his insistence that intent is a prerequisite for a due process violation.

First, the dissent's extreme view of this court's fact pleading standard may be read as suggesting that it can be used as a vehicle by which we can rid ourselves of litigation alleging civil rights violations. However, our "modicum of factual specificity" standard for evaluating section 1983 complaints was not designed to subvert the Congressional purpose behind section 1983. That statute "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S.Ct. 1398, 1416, 63 L.Ed.2d 673 (1980). No precedent authorizes a federal court to dismiss this potentially meritorious claim of a constitutional violation when the relevant facts were known only to Stierheim, who is

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9. For example, compare the majority's statement: "A detainee is entitled under the Due Process Clause of the Fourteenth Amendment to, *at a minimum, no less protection* for personal security than that afforded convicted prisoners under the Fourteenth Amendment and no less a level of medical care than that required for convicted prisoners by the Eighth Amendment," Majority op. at 668 (emphasis added), with the dissent's alteration, *i.e.*, "the majority understandably *equates* the protections afforded prisoners under the Eighth Amendment with the protections afforded detainees under the Due Process Clause of the Fourteenth Amendment." Dissent op. at 676 (emphasis added).

Also, there is absolutely nothing in this court's in banc opinion in *Davidson v. O'Lone*, 752 F.2d 817, to support the dissent's statement that that decision "recognized the requirement that some level of intent be pleaded and proved in a § 1983 due process claim." Dissent op. at 676 n. 3. The statement is particularly questionable given the authorship of the majority's opinion there and here.

dead, and defendants, who have declined to provide the available information. As we noted in Part III *supra*, the claim is not a frivolous one, and defendants, who have vastly superior access than the plaintiff to the relevant facts, should be well able to answer to the complaint, when amended. The dissent posits that because Stierheim was dressed in a halter top and denim shorts, the gun was concealed in a body cavity discoverable only by a "constitutionally suspect" intrusive search. Dissenting at 683 n. 14. The undeveloped record discloses no factual basis for the dissent's hypothesis. All the majority holds is that plaintiff is entitled to proceed beyond a Rule 12(b)(6) dismissal to discovery.[10]

Second, the dissent believes that there is no room in the broad protection provided by the Fourteenth Amendment for claims based on suicide unless the police assisted or encouraged the act. Dissent at 682. Thus, in Judge Garth's view, prison officials may sit idly by watching as a vulnerable inmate takes her own life as long as they neither supply the gun nor egg her on. In Judge Garth's narrow view of the Fourteenth Amendment no disregard, no matter how callous, can amount to a Fourteenth Amendment violation. He would allow only a state tort negligence action. Dissent at 681 n. 11. Fortunately, neither this court nor the Supreme Court has accepted that position. Instead, the applicable precedent recognizes that custodial authorities have an obligation to protect those placed within their custody and, under certain circumstances, that obligation includes protection from self-inflicted wounds.

Finally, Judge Garth, apparently eager to rush in where the Supreme Court has, as yet, declined to tread, would have us "fill in the undefined area that remains"

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10. Again, compare the majority's opinion, Majority op. at 670–671, with the dissent's mischaracterization of it at Dissent op. at 683–685.

in determining what constitutes a violation of the Fourteenth Amendment due process guarantee. Dissent op. at 677. We prefer to adhere to the established principle that courts should not dash headlong into constitutional pronouncements.

In his dissent, Judge Garth, who continuously merges the Eighth and the Fourteenth Amendment standards, argues that the Supreme Court opinions in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), adopted the position that conduct "tantamount to intent" is one of the requisite elements of a viable cause of action alleging a violation of the Due Process Clause. Dissent op. at 676 n. 2.[11] The dissent's wish may be father to the thought. There is no clearer evidence that there was no such holding than the Court's own statement that it "recently *reserved* the general question 'whether something less than intentional conduct, such as recklessness or "gross negligence" is enough to trigger the protections of the Due Process Clause.' " *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986) (quoting *Daniels v. Williams*, 106 S.Ct. at 667 n. 3) (emphasis added). In *Daniels*, the Court recognized that conduct covered by section 1983 would undoubtedly fall between the poles of negligence and intentional conduct when it stated that, "[t]he difference between one end of the spectrum negligence—and the other—intent—is abundantly clear." *Daniels v. Williams*, 106 S.Ct. at 667.

The dissent argues that litigants and district court judges need to be provided with a reliable standard for section 1983 claims. Dissent op. at 684 n. 17. Notably, the Supreme Court, when faced with an analogous

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11. We note the inconsistency in Judge Garth's opinion stating, on the one hand, that the Supreme Court has held intent is a required element of a due process claim, *see, e.g.*, Dissent op. at 676 n. 2, and, on the other hand, that we should step in because the Supreme Court has given no "definitive guidance", *id.* at 677.

argument, responded by "declin[ing] to trivialize the due process clause in an effort to simplify constitutional litigation." *Daniels*, 474 U.S. at 335, 106 S.Ct. at 667. Judge Garth's emotional call for an in banc hearing overlooks that just three years ago this court, in banc, reviewed the applicable principles and gave some guidance (which Judge Garth now criticizes as dictum). However, we decided to "eschew prescribing a comprehensive litmus test to determine which actions are or are not within § 1983, particularly since such a test has so far eluded the Supreme Court." *Davidson v. O'Lone*, 752 F.2d at 827. Although we may be required to limn the boundaries more specifically when the issue is before us, this is a particularly inappropriate case in which to enunciate the dictum proffered by the dissent. After discovery, the facts might show neither gross negligence nor reckless disregard of Stierheim's constitutional rights or both. On the other hand, discovery might disclose even such "obduracy and wantonness", *see Whitley*, 475 U.S. at 319, 106 S.Ct. at 1084, as would fit within Judge Garth's restrictive view of due process. Unless this matter proceeds beyond a dismissal, the facts will not be brought to light.

VII.

Conclusion

For the reasons set forth above, we will affirm that part of the district court's order dismissing the complaint as to Kerns and Ward in their individual capacities, we will reverse the district court's order dismissing the complaint against the other defendants and we will remand for further proceedings in accordance with this opinion.

GARTH, Circuit Judge, dissenting:

My disagreement with the majority is a fundamental one. We disagree on the level of intent required for a viable, due process based, § 1983 claim. The majority

today, in disregard of Supreme Court instruction, has conclusorily asserted that allegations of gross negligence or deliberate indifference are sufficient to sustain a due process § 1983 claim. By using these terms interchangeably, and by not giving content to their meaning, the majority has failed to announce a meaningful standard that can be applied by the bar, the district court and indeed this court.

The standard that I understand is the appropriate due process, § 1983 standard, requires affirmative pleading either of intentional action or of an abuse of power by state officials, or of actions or inactions which may be deemed tantamount to an intentional act. Moreover, so that there is clear meaning, uniformity and certainty in the definition of the standard itself, as well as in its application to particular facts, I would define "intentional" in terms of the Restatement (Second) of Torts, § 8A.

> The word "intent is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.
>
> Comment: * * *
>
> b. . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.[1]

Id. See also Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 761 (5th Cir.1984).

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1. By actions or inactions tantamount to intent, I mean those actions in which the consequences complained of are substantially certain to result, as set forth above in the quoted language from the Restatement.

Also of concern to me is the majority opinion's departure from our precedents which require that civil rights complaints must be specifically pleaded, and the majority's apparent approval of a civil rights cause of action which charges a municipality with having violated a detainee's constitutional rights where the detainee has taken her own life.

I dissent.

I.

In the context of this case, where Colburn as Administratrix alleges a violation of Stierheim's constitutional rights (in particular her due process liberty interest), a § 1983 cause of action requires, as I have indicated above, an affirmative pleading of *intentional* actions by state officials or an *abuse of power* by state officials or *actions or inactions* by state officials which are *tantamount to an intentional act*. Unless one of these three elements is properly pleaded with specific facts supporting the allegation, the complaint cannot survive a motion to dismiss. *Daniels v. Williams*, 474 U.S. 327, 331-332, 106 S.Ct. 662, 665-66, 88 L.Ed.2d 662, *Davidson v. Cannon*, 474 U.S. 344, 347-348, 106 S.Ct. 668, 670–71, 88 L.Ed.2d 677.[2] In *Daniels*, the

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2. To the extent tht the case of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) has been read as approving a mere negligence standard for a § 1983 claim which alleged violations of a constitutional due process right, it was overruled by *Daniels*. In *Parratt*, the Supreme Court held that § 1983 does not contain an independent state of mind requirement. In his concurring opinion in *Parratt*, Justice Powell, while agreeing with the Court that § 1983 had no state of mind requirement, argued that the intent issue was still germane in a § 1983 action in determining the elements for a cause of action for a violation of the Due Process Clause. *Parratt*, 451 U.S. at 547, 101 S.Ct. at 1919. Justice Powell explained that

> The intent question cannot be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." Baker v.

complainant was a prison inmate who had tripped on the stairs because a pillow had been left there by a deputy sheriff. Daniels brought suit under § 1983 alleging that he had been ". . . deprived . . . of his 'liberty' interest in freedom from bodily injury." *Daniels*, 474 U.S. at 328, 106 S.Ct. at 664. The Supreme Court affirmed the grant of summary judgment in favor of the deputy sheriff, holding that the Due Process Clause is not implicated by a state official's negligent act which caused unintended injury to life, liberty or property. The Court noted that the guarantee of due process provided by the Fourteenth Amendment has historically "been applied to *deliberate* decisions of government officials to deprive a person of

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NOTES *(Continued)*

McCollan, 443 U.S. 137, 139-140 [99 S.Ct. 2689, 2692-93, 61 L.Ed.2d 433] (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted, in determining whether intent is a necessary element of such a violation.

Id. at 547-548, 101 S.Ct. at 1919.

The Supreme Court has adopted Justice Powell's position. The Court has held that some conduct, which I read as at least conduct tantamount to intent, is one of the requisite elements of a viable cause of action alleging a violation of the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327, 331-332, 106 S.Ct. 662, 665-66, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-348, 106 S. Ct. 668, 670-71, 88 L.Ed.2d 677 (1986).

In his concurring opinion in *Daniels* and *Davidson*, Justice Stevens sets forth three different types of due process violations. *Daniels*, 474 U.S. at 337, 106 S.Ct. at 677. The three types of due process he perceives are: 1. the due process that incorporates specific protections defined in the Bill of Rights; 2. substantive due process; and 3. procedural due process.

In this case, Colburn cannot allege a violation of a specific provision of the Bill of Rights, and issues concerning adequate notice and proper hearings are patently ludicrous in this case where Stierheim has taken her own life. Clearly Colburn is alleging a violation of substantive due process and it is precisely this type of due process violation which requires some modicum of intent or conduct tantamount to intent, as I have explained in text, *supra*, in order to state a viable cause of action.

life, liberty or property." *Id.* 106 S.Ct. at 665 (emphasis in original). In addition, *Daniels* held that a sufficient due process § 1983 claim must also allege arbitrariness and abuse of power by state officials. *Id. See also Partridge v. Two Unknown Police Officers of Houston,* 791 F.2d 1182, 1183 (5th Cir.1986).

Similarly, in *Davidson,*[3] the Supreme Court held that the Due Process Clauses was designed to protect against "abusive government conduct" in which government power is employed as "an instrument of oppression." The Court explained that:

> the Due Process clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property.
>
> * * * * * *
>
> [t]he guarantee of Due Process has never been understood to mean that the State must guarantee due care on the part of its officials.

Id. at 670.

Furthermore, the majority understandably equates the protections afforded prisoners under the Eighth Amendment with the protections afforded detainees under the Due Process Clause of the Fourteenth Amendment. Maj. Op. at ——. *See also Williams v. Mussomelli,* 722 F.2d 1130, 1132-34 (3d Cir.1983);

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3. This court's in banc decision in *Davidson,* 752 F.2d 817 (3d Cir.1984) (in banc), which was affirmed by the Supreme Court, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), recognized the requirement that some level of intent be pleaded and proved in a § 1983 due process claim or, in other words, that mere negligence is not enough. Indeed, had it held otherwise, I would not have joined the in banc opinion. The reference in our *Davidson* opinion to gross negligence or recklessness, 752 F.2d at 828, is obviously dicta because *Davidson* involved no more than mere negligence. *See* note 4 *infra.*

Rhodes v. Robinson, 612 F.2d 766, 773 (3d Cir.1979). Yet the majority ignores the fact that in *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976), the Supreme Court held that in order to state a cognizable Eighth Amendment, § 1983 claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence *deliberate indifference* to serious medical needs." *Id.* at 106 97 S.Ct. at 292 (emphasis added).

In *Whitley v. Albers,* 475 U.S. 312, 319-320, 106 S. Ct. 1078, 1084-85, 89 L.Ed.2d 251 (1986), the Supreme Court reaffirmed the *Estelle* standard, and held that it applied in contexts other than a prisoner's medical needs. *Whitley* involved a prison guard's shooting of a prisoner during a prison riot. The Supreme Court, in upholding a directed verdict for the prison authorities, stated that:

> it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited under the Cruel and Unusual Punishments Clause, whether the conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Id. at 319, 106 S.Ct. at 1084.

In order to establish a viable claim, the Court held that a plaintiff must show acts which "evinced such wantonness with respect to the unjustified infliction of harm as is *tantamount to a knowing willingness that it occur." Id.* at 321, 106 S.Ct. at 1085. (emphasis added). *See also Campbell v. Greer,* 831 F.2d 700, 702 (7th Cir.1987) (Liability under the Eighth Amendment "requires at a minimum, that prison officials have realized there was imminent danger and have refused—consciously refused, knowingly refused—to do anything

about it.");[4] *Duckworth v. Franzen*, 780 F.2d 645, 654 (7th Cir.1985) (Liability requires "an act so dangerous that the defendant's knowledge of the risk can be inferred."), *cert. denied*, __ U.S. __, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

I recognize that *Daniels* reserved the general question "whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause." *Daniels v. Williams*, 474 U.S. 327, 334 n. 3, 106 S.Ct. 662, 667 n. 3, 88 L.Ed.2d 663. Indeed, it is precisely because the Supreme Court has given no definitive guidance in this area but has sketched only a general outline, that I believe this court as an institution, has the responsibility to fill in the undefined area that remains. The standard which I believe is the correct standard, is the one set forth at the outset of this dissent, which conforms with the Supreme Court's instruction in *Daniels, Davidson* and *Whitley*. Thus, a viable due process § 1983 claim must allege intentional acts by state officials, their abuse of power, or their actions or inactions which are tantamount to intentional acts, which deprive a person of his life, liberty or property.

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4. The district court's charge requiring intentional conduct, which was affirmed in *Campbell*, reads as follows:

> In order for plaintiff to prevail it must be shown that defendants actually intended to deprive him of reasonable protection, or that defendants acted with deliberate indifference to plaintiff's legitimate need for protection. *When I use the phrase "deliberate indifference" I mean conduct which intentionally or deliberately or recklessly ignores any person's constitutional rights.* Deliberate indifference is established only if there is actual knowledge of impending harm rather than a mere suspicion that plaintiffs would be assaulted and [if] the defendants consciously and culpably refused to take steps to prevent this assault.
>
> Mere negligence or inadvertence does not constitute deliberate indifference. (Emphasis added)

Campbell v. Greer, 831 F.2d 700, 702 (7th Cir.1987).

In short, under this standard, given a spectrum with a negligent act at one end and an intentional act at the other, no claim would lie under the Due Process Clause and § 1983, if the challenged conduct fell in that part of the spectrum where the act was not sufficiently intentional to be construed as an abuse of power or where an action or inaction was not tantamount to an intentional act. The majority opinion largely ignores *Daniels*, *Davidson* and *Whitley*, thereby erring in "effectively collaps[ing] the distinction between mere negligence and wanton conduct." *Whitley*, 475 U.S. at 322, 106 S.Ct. at 1086.

Even in *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182 (5th Cir.1986), the case upon which the majority relies so heavily, the Fifth Circuit required that the *Partridge* plaintiffs show "a deliberately adopted policy that constituted indifference" and a "deliberate pattern of conduct" amounting to "the kind of arbitrariness and abuse of power that is preserved as a component of the due process clause. . . ." *Id.* at 1183.[5]

Colburn has not even alleged facts which would have been deemed sufficient by the *Partridge* court, nor does she contend that she will be able to do so after discovery. (If indeed discovery was even implicated in a 12(b)(6) proceeding. *See* Part III, *infra.*) Indeed, neither the complaint upon which the district court ruled, nor Colburn's memorandum "amending" that complaint, to

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5. The *Partridge* allegations, if fleshed out with specific facts as required by our civil rights pleading jurisprudence, *see* text Part II., *infra*, might well be deemed sufficient for a § 1983 due process cause of action because they allege intentional actions by the defendants. Significantly, the court in *Partridge* was divided, with the majority of the *Partridge* court holding that the *Daniels* requirement was met while Judge Jolly in dissent found that even these allegations were deficient. *See Partridge*, 791 F.2d at 1190 (J. Jolly, dissenting) ("Hard as I may try, the words of the complaint do not lead me to the same conclusions as they do the majority.")

which the majority addresses itself, meet the due process § 1983 standard to which I have adverted. At best, Colburn's complaint and purported amendments set forth a cause of action for negligence.

Nor does Colburn demonstrate how each defendant was personally involved in the intentional deprivation of Stierheim's constitutional rights.[6] *See Bracey v. Grenoble*, 494 F.2d 566 (3d Cir.1974). Colburn's complaint alleges no more than a failure to adequately search, supervise, and monitor. Following are its relevant paragraphs:

> 14. At approximately 5:00 p.m. on April 30, 1985, Melinda Lee Stierheim was taken into custody by Defendant, Upper Darby Township Police Department, visibly intoxicated.
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> 16. Prior to placing Melinda Lee Stierheim in a jail cell, Defendant, Diane Miller, searched Melinda Lee Stierheim for, among other things, contraband and hidden objects which Melinda Lee Stierheim could use to injure herself.
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> 17. Defendant, Diane Miller, negligently, carelessly and recklessly failed to adequately search Melinda Lee Stierheim, permitting her to retain possession of the handgun while detained in a jail cell of Defendant, Upper Darby Township Police Department.

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6. I recognize that in some contexts, no identification of particular defendants is required. *District Council 47, American Federation of State, County and Municipal Employees v. Bradley*, 795 F.2d 310, 314 (3d Cir.1986). Where, however, the charges made here by a plaintiff, are in terms of a police officer's familiarity with the victim's relationship with a motorcycle gang, or with police officers' knowledge that the victim (Stierheim) was "extremely depressed for personal reasons," or had previously jumped from a window; etc. (see Colburn's proposed amendments, Brief of Appellant at 5-6, maj. op. at 672-673,) the need for particularized identification becomes essential.

18. As a direct and proximate result of Defendant, Diane Miller's, failure to adequately search Melinda Lee Stierheim, Melinda Lee Stierheim shot herself with the handgun at approximately 9:00 p.m. on April 30, 1985 and died at approximately 2:33 a.m. on May 1, 1985.

* * * * * *

20. Defendants, Diane Miller, Martin Kerns, James J. Ward, Upper Darby Township and Upper Darby Township Police Department, have exhibited a custom of laxity regarding the supervision and monitoring of their jail cells and in searching individuals taken into police custody.

* * * * * *

[Civil Rights Cause of Action]

34. Defendants' custom of laxity in supervising and monitoring their jail cells and, also, in searching individuals taken into police custody exhibited gross negligence in their duties and a deliberate indifference to the medical needs of Melinda Lee Stierheim when she was taken into police custody.

35. Defendants' gross negligence and deliberate indifference to Melinda Lee Stierheim's medical needs, all of which was committed under color of state law while said individual Defendants were acting under the authority issued to them by Defendants, Upper Darby Township and Upper Darby Township Police Department, was a direct and proximate result of Melinda Lee Stierheim's death and a violation of her rights under the laws and Constitution of the United States, in particular the Eighth and Fourteenth Amendments thereof and 42 U.S. C. Section 1983, et seq.

App. at 7-8, 12.

II.

Not only does Colburn's complaint fail to allege intend, or abuse of power, or deliberate action or inaction tantamount to intent, (at least one of which is required to sustain an action charging a due process violation) but her complaint fails to allege *any facts* which could support such allegations. Even if general allegations of gross negligence[7] or recklessness were sufficient to state a due process action under § 1983, which I suggest they are not *unless* they are defined as being equivalent

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7. In *Davidson v. O'Lone*, 752 F.2d 817, 828 (3d Cir.1984) (in banc), *aff'd sub nom. Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 688, 88 L.Ed.2d 677 (1986) a case involving mere negligence (a failure of a prison official to read an inmate's note of warning) the majority opinion included the sentence "Liability under §1983 may be imposed on prison officials . . . if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials." As earlier noted, (n. 3, supra), references to "recklessness" or "gross negligence" constituted dicta because neither had been involved in *Davidson*.

Of the nine judges who sat on the in banc court, only four accepted the proposition that undefined gross negligence was actionable under § 1983. *See* 752 F.2d at 828 n. 8. The majority's contention here, Maj. Op. at 668 n. 3 that tacit agreement to liability for gross negligence can be assumed from the dissenters in *Davidson* who favored liability for mere negligence, ignores the fact that the Supreme Court, in affirming *Davidson*, specifically rejected the in banc dissenters' position. Moreover, the dissenting positions had been originally adopted because of the Supreme Court language which appears in *Parratt* and which has now been overruled by *Daniels*. *Daniels*, 474 U.S. at 330-331, 106 S.Ct. at 664-65.

It is true that in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 508 (3d Cir.1985), this court, again speaking through Judge Sloviter, employed the terms "deliberate indifference", "reckless disregard" and "gross negligence" in discussing the standard for a § 1983 due process claim. However, in that case, as in both *Davidson* and the majority opinion here, no definition was, or is, given as to what those "buzzwords" mean and no content can be attributed to them from the discussion in either opinion.

Thus, as of this date, this court has yet to explicitly define the standard for a due process based § 1983 action.

to intent, abuse of power or deliberate action or inaction tantamount to intent, Colburn's complaint is barren of any facts which could give content to those terms. Thus, her complaint, even as amended cannot be sustained.

I can best illustrate this concept by a hypothetical pleading. If a complaint had merely stated the conclusory allegation that a police guard had intentionally caused Stierheim's death, that allegation by itself and without some factual support giving content to the alleged intentional act, would be insufficient under the civil rights pleading standards set forth in *District Council 47, American Federation of State, County and Municipal Employees v. Bradley*, 795 F.2d 310 (3d Cir. 1986); *Frazier v. Southeastern Pennsylvania Transportation Authority*, 785 F.2d 65, 67 (3d Cir.1986); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976). Among other things, such an allegation provides no notice to a defendant so that an appropriate answer might be framed. *See Frazier*, 785 F.2d at 68. *A fortiori* allegations in a civil rights complaint in terms of "gross negligence," "recklessness" or "deliberate indifference," *without more*, are equally defective. See Colburn's Complaint ¶34 & 35, App. at 12.

On the other hand, if a hypothetical complaint alleged that the police guard had intentionally caused Stierheim's death by furnishing Steirheim with the weapon, encouraging or taunting Stierheim to shoot herself, or by encouraging or assisting in any other way, such an act to take place, then the pleading would not only meet the substantive requirements for a § 1983 due process action, it also would have met the pleading requirements of *District Council 47*, *Frazier*, and *Rotolo*.[8]

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8. *District Council 47, American Federation of State, County and Municipal Employees v. Bradley*, 795 F.2d 310 (3d Cir.1986) does not hold to the contrary. *District Council 47* does no more than reiterate the specificity standard set forth in *Rotolo*, recognizing again that the sufficiency of a civil rights complaint must be

Here of course the complaint, as well as the proposed amendatory allegations, fall far short of meeting the standards of either. A § 1983 due process action must be predicated on acts of the defendant which are either intentional or which are tantamount to intentional acts. Were it otherwise, all torts resulting from mere negligence would be swept within the parameters of a § 1983 due process claim and § 1983 would become a fount of all tort litigation. Indeed, the mere inclusion of the word "reckless" or the term "gross negligence" cannot without more, convert a cause of action in negligence (not sustainable under § 1983) into a constitutional cause of action. If such were to be the case, artful pleaders, through such a device and without alleging specifically the intentional or "tantamount to intentional acts" which are challenged, could open constitutional doors to every tort cause of action. Thus, to plead such a § 1983 cause of action properly, some *facts* evidencing intent or acts tantamount to intent must be pleaded — here they were not.

The "facts" not pleaded but sought to be proved appear on pages 70-72 of the appendix. However, assuming the truth of these allegations and all inferences in favor of Colburn, they would establish no more than that Stierheim was known to the Upper Darby Police Department, that she was depressed, that after a fight

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determined on a case by case basis. In *District Council 47* the complainant identified the specific constitutional right violated and the specific directors of the court responsible for violating that right. There was no uncertainty in *District Council 47*, as to who did what to whom, when and how, as there is in this case. Hence *District Council 47* does not stand for a lessening of the pleading requirements in this Circuit but rather reinforces *Rotolo's* requirements of specificity. Nor does the discussion concerning amending the complaint, in *District Council 47*, aid the plaintiff here. Even if we were to accept every proposed allegation which appears in plaintiff's memorandum filed in the district court, and the plaintiff's brief filed on appeal, the complaint still is insufficient to satisfy the requirements of § 1983 action.

with her boyfriend she had jumped out of the window of her apartment on to an adjoining roof, that she had scars on her wrist, that unspecified police had prevented her from taking three valium pills while in custody, that she had been "patted down" by a police matron, that this pat-down revealed one bullet, and that her cell was "merely" monitored by video camera once every half hour.

Accordingly, if we were to apply the "tantamount to intent" standard to the allegations of Colburn's initial complaint or to Colburn's proposed amended complaint, it is quite plain that neither can survive a 12(b)(6) motion. No matter how liberally Colburn's complaint is construed, nothing approaching conduct "tantamount to intent," has been or can be attributed to the defendants or any one of them.

It adds nothing to the analysis for the majority to state ". . . the [Colburn] claim is not a frivolous one . . ." or that "[n]o precedent authorizes a federal court to dismiss this potentially meritorious claim of a constitutional violation when the relevant facts were known only to Stierheim, who is dead, and defendants, who have declined to provide the information." Maj. op. at 673. The sole question for decision is whether Colburn's complaint can survive a 12(b)(6) motion to dismiss.[9]

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9. Judge Sloviter's conclusion that Colburn's claim is not frivolous because it provides ample notice to the defendants so that they may frame an answer to the complaint when amended, Maj. op. at 673, has unfortunately confused two issues.

Sufficient notce to frame an answer to the complaint is required only when the factual specificity of a civil rights complaint is in question. *Frazier v. Southeastern Pennsylvania Transportation Authority*, 785 F.2d 65, 67 (3d Cir.1986). That standard is irrelevant when the issue presented is whether a complaint is legally sufficient. To resolve this latter issue, the analysis requires that all elements which constitute such a claim be alleged.

As I have demonstrated in this dissent, the Colburn complaint, even if and when amended, does not meet either standard. *Compare*

To hold that a claim is not frivolous, is to hold that all of the elements required for such a claim can be found in the allegations of the complaint. Yet neither Colburn, nor the majority opinion, has identified those elements. I have attempted to do so by arguing that actions "tantamount to intent" must be pleaded. Because they were not pleaded by Colburn, I have found the complaint deficient.

Unfortunately, however, the majority, without identifying those elements which would lead to a holding of a non-frivolous § 1983 claim, has "put the rabbit in the hat" and has badly held that Colburn's claim is not frivolous and that it has potential merit as a constitutional claim. Indeed, if the majority opinion had defined the requirements for a "grossly negligent" standard so that a complaint could be properly tested in light of those requirements, I would be less inclined to criticize the majority's *ipse dixit* statement that Colburn's claim "is not frivolous" and that it presents a "potentially meritorious claim of constitutional violation."

Thus, in reviewing the facts alleged in Colburn's complaint and brief, I cannot see how those facts, even if pleaded properly, could meet the standard of "conduct tantamount to intent." Indeed, the most that can be said is that Colburn's allegations establish mere negligence — if that!

III.

I am also troubled by the majority's willingness to overlook the fact that this appeal comes to us after the district court had granted a Fed.R.Civ.P. 12(b)(6) motion to dismiss. Implicit in the majority opinion is the suggestion that before the district court could rule on the defendant's 12(b)(6) motion, the plaintiff should have been permitted discovery.[10]

Part I of this dissent, *supra*, (legal sufficiency of complaint) *with* Part II, *supra* (factual specificity of complaint).

10. Defendants have not yet responded to plaintiff's interrogatories and her requests for production of documents.

Federal Rule of Civil Procedure 12(b)(6) does not have a provision similar to the summary judgment Rule, Fed.R.Civ.P. 56(f), permitting limiting discovery to oppose a motion. However, factual development is irrelevant to the disposition of a motion under 12(b)(6). It is the legal sufficiency of the complaint which is at issue.

I cannot subscribe to converting every 12(b)(6) motion into a summary judgment motion. If the plaintiff does not have sufficient facts to satisfy the specificity required by our civil rights cases, *see e.g. Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir.1976), then it may be that the plaintiff cannot sustain a constitutional cause of action. If that is the case, then our civil rights pleading requirements have served their purpose of differentiating between constitutional torts requiring some level of intent and those which are insufficiently intentional, though they are committed by state actors, to state a constitutional violation.[11]

This, of course, does not mean that the plaintiff has been denied her day in court. Certainly on allegations

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NOTES *(Continued)*

Maj. op at 667.

Plaintiff is therefore entitled to a reasonable amount of discovery to help her make the necessary showing to prove her case.

Maj. op. at 670.

After discovery the facts might show neither gross negligence nor reckless disregard of Stierheim's rights or both.

Maj. op. at 675.

See also Maj. op. at 671 n. 6 ("Colburn cannot survive a motion for summary judgment or directed verdict without developing, by way of discovery (or proof at trial), facts beyond those set forth in her proposed amended

11. Section 1983 was enacted by Congress as a remedy for acts of intentional violence committed by the Ku Klux Klan, where a state was unable or unwilling to enforce the law. *Monroe v. Pape*, 365 U.S. 167, 174-176, 81 S.Ct. 473, 477-78, 5 L.Ed.2d 492 (1960). Thus, from its very inception, the element of some degree of intent has been required to state a § 1983 due process claim, and it is that element that distinguishes a § 1983 (constitutional) tort from all others.

such as Colburn proposes, an action for negligence would survive in an appropriate state or federal forum, but obviously not as a constitutional action. Discovery could thereupon proceed apace and if that discovery revealed constitutional abuses, nothing would then prevent the plaintiff's assertion of such a cause of action. Hence, the apparent conflict foreseen by the majority in terms of our pleading requirements and Rule 11 is chimerical. *See* Maj. op. at 667.

IV.

Apart from all other considerations, I cannot agree with the majority's holding that a suicide without police assistance, involvement, or encouragement, may give rise to a constitutional violation by the police and municipal authorities. Where there have been no intentional acts on the part of the police, no abuse of power on their part and no encouragement given to the suicide by the police, no basis exists for a §1983 due process claim when an individual takes her own life.[12] Yet, Judge

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12. The majority has mischaracterized my position, when it states:

> [I]n Judge Garth's view, prison officials may sit idly by watching as a vulnerable inmate takes her own life as long as they neither supply the gun nor egg her on.

Maj. op. at 674.

As the members of the majority must know, the entire thesis of this dissent is based upon the distinction between constitutional violations and other tortious conduct. Obviously, a prison official who sits idly by while an inmate attempts suicide, as the majority hypothesizes, would not be free from liability and would unquestionably be required to respond in damages, albeit not for a constitutional violation, but for a violation of state law.

As Justice Douglas wrote for the plurality in *Screws v. United States*, 325 U.S. 91, 108, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495 (1945), "violation of local law does not necessarily mean that federal rights have been invaded." Indeed, Judge Sloviter herself quoted from Justice Douglas' opinion in *Screws* when she wrote in *Davidson*:

Sloviter, arguing that discovery under an amended complaint would cure any pleading deficiency, concludes that Colburn, if she can prove the allegations hypothesized in the appendix at 70-72, can sustain a valid constitutional claim against *all* of the defendants. See Maj. op. at p. 670. Judge Becker, on the other hand, would hold that even if the Colburn allegations, which appear in her brief on appeal and which are summarized on page 670 of the majority opinion, are proved, they would still be insufficient for a due process based §1983 complaint unless gross negligence is construed as something less than "deliberate indifference" or "reckless disregard." *See* Maj. op. at 671 n. 6.[13] The allegations to which the majority refers are summarized at page 670 of the majority opinion:

> (1) that the Upper Darby police were familiar with Stierheim from previous encounters as a result of her relationship with members of the "Warlocks" motorcycle gang; (2) that on the day before her suicide the Upper Darby police had been called to Stierheim's apartment after Stierheim had jumped from the window following an argument with her boyfriend; (3) that Stierheim was extremely depressed for personal reasons; (4) that Stierheim had

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NOTES *(Continued)*

> . . . Congress should *not* be understood to have attempted "to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some rights secured by the Constitution or laws of the United States." 325 U.S. at 109, 65 S.Ct. at 1039, also *quoted in Paul v. Davis*, 424 U.S. at 700, 96 S.Ct. at 1160.
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> 752 F.2d at 824 (*quoting Screws*, 325 U.S. at 109, 65 S.Ct. at 1039).

13. Inasmuch as I understand Judge Becker's position to be that the term "gross negligence" is equated with a "tantamount to intent" standard, I have serious question whether the opinion, which purports to be the majority opinion, does in fact speak for the majority of the court.

> obvious scars on her right wrist from a previous suicide attempt; (5) that the detaining officer had to prevent Stierheim from swallowing three Valium pills she had removed from her purse; (6) that Stierheim was detained by the police "for her own protection"; and (7) that Miller found a live round of ammunition in Stierheim's pocket.

I have earlier referred to these allegations in arguing that even proof of such facts, could not meet the intent and abuse of power requirements of a §1983 due process action. For instance, who were the Upper Darby police officers who were familiar with Stierheim's relationship with the "Warlocks" motorcycle gang? Is proof of that knowledge equivalent to an intent to encourage Stierheim's suicide? Is proof of that knowledge to be imputed to every police officer in the police department and in the prison, including Matron Miller? Is proof of the knowledge had by "Upper Darby Police" of Stierheim's jump from a window, or, that Stierheim had scars on her wrist, to be imputed to Matron Miller? And how can a responsible pleader charge that Miller or any of the police officers or officials *knew* that Stierheim was "extremely depressed for personal reasons?"

Does the fact that Stierheim had three valium pills taken from her purse lead to the inexorable conclusion that the police officer who removed them, intentionally encouraged or assisted in her suicide, or, that the knowledge of the existence of three pills must be imputed to others in the police department or in the municipality?[14]

Similarly Stierheim's detention "for her own protection," and the disclosure of a round of ammunition in her

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14. Does the majority expect judicial notice to be taken that swallowing three valium pills will result in death? Indeed, the inference is greater that if the pills remained in her possession and had been ingested, Stierheim might not have taken her own life that night.

pocket when she was "patted down" cannot be imputed to persons who were not present when the particular events transpired, nor can they lead to inferences of intentional acts on the part of any defendant to make Stierheim commit suicide. What were the acts of "gross negligence" that Colburn claims are attributable to each defendant? Complaint at ¶35, App. at 12. What were Stierheim's medical needs to which somebody was "deliberately indifferent?" Complaint at ¶35, App. at 12.[15]

Thus, in the first instance, I cannot understand how the allegations on which the majority relies as forming the nucleus of a new and different complaint, could, even if established, state a §1983 due process claim against the police and municipal authorities. Not only do these allegations fail to specify the allegedly responsible individuals, fail to establish a legal connection between any actor and knowledge held by others, fail to identify the affirmative "moving force" which might implicate the liability of the police department and the municipality[16]—but even more egregiously, these allegations disclose not one scintilla of intent or actions tantamount to intent or abuse of power which are at the heart of due process civil rights actions, such as this action brought under §1983.

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15. The majority also ignores the fact that the decedent was dressed in a halter top and denim shorts. Apparently the gun which she used to kill herself was concealed in a body cavity. Given the constitutionally suspect nature of body cavity searches, it is ludicrous to hold that the failure to perform this most intrusive action creates liability for damages. *See* Note, *Do Prison Inmates Retain any Fourth Amendment Protection From Body Cavity Searches?*, 56 U.Cin.L.Rev. 739 (1987) ("It is precisely this instinctive feeling that body cavity searches grossly intrude upon the very core of an individual's privacy that should cause courts to give serious consideration to the legitimacy of the practice.").

16. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

A.

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) cannot be deemed to support the complaint here, or for that matter even a proposed complaint setting forth allegations which Colburn now claims represent her charges against the defendants. In *Tuttle,* a police officer shot and killed Tuttle at the scene of a robbery. Tuttle's administratrix brought a §1983 action against the police officer and Oklahoma City. Although the jury returned a verdict in favor of a police officer it held the City liable. The City appealed. The Court of Appeals held that proof of a single incident of unconstitutional activity by a police officer, sufficed to establish municipal liability. The Supreme Court reversed in an opinion in which now Chief Justice Rehnquist announced the judgment of the Court, stating, among other things, that the policy requirement of *Monell v. New York City Dept. of Social Services,*[17]

> . . . should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers.
>
> * * * * * *
>
> At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.
>
> * * * * * *

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17. 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The *Monell* court held that only deprivations suffered pursuant to municipal "custom" or "policy" could lead to municipal liability; thus providing a fault based analysis for imposing municipal liability.

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker. . . . But where the policy relied upon is not itself unconstitutional, considerably more proof than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Tuttle, 471 U.S. at 821, 823-24, 105 S.Ct. at 2436-37. (Footnotes omitted)

Thus *Tuttle* requires that if a custom or policy is adopted by the police department or the municipality it may only be actionable if the policy maker chooses such a policy or program or adopts such a custom in a deliberate manner, designed to result in the unconstitutional act itself, in this case, Stierheim's suicide. As the Court in *Tuttle* skeptically observed:

> [E]ven assuming that such a "policy" would suffice, it is open to question whether a policymaker's "gross negligence" in establishing police training practices [here, supervision and monitoring] could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policy maker would be required.

471 U.S. at 824 n. 7, 105 S.Ct. at 2436 n. 7.

B.

It must be apparent from my discussion, that I would not have voted with the majority in *Partridge*, even though the allegations in *Partridge* are far nearer the mark in terms of intent and deliberateness than are the allegations found in the Colburn complaint. I would

not have joined in the *Partridge* majority for much the same reasons as expressed by Judge Jolly in his *Partridge* dissent. 791 F.2d at 1190. I, too, cannot be convinced that when it is the decreased herself who has taken her own life, that any policy, custom, lack of supervision or lack of monitoring can provide the affirmative "moving force" which would constitute a constitutional violation. As Judge Jolly stated in *Partridge* ". . . it is contrary to common sense to believe that the [Town of Upper Darby and Upper Darby Police Department] would *deliberately* have adopted a policy of inadequate supervision that would lead to a strong likelihood of a detainee's suicide." *Id.* at 1191 (my emphasis).

In sum therefore, I can discern no basis for the assertion of a §1983 due process claim against the defendants joined here, where a suicide without intentional police involvement has occurred.

V.

I have dissented in this case because I am convinced that the majority has departed from this court's precedents insofar as the majority approves the pleading of a civil rights complaint without the required specificity.

Of far greater importance however, is the failure of the majority to unequivocally set forth a meaningful standard, and more particularly a "tantamount to intent" standard, for a §1983 due process action. Moreover, the majority has failed to acknowledge Supreme Court instruction with respect to the liability of the municipal defendants and the Upper Darby Police.

I therefore dissent and because of the institutional and jurisprudential concerns which I have identified, I urge full court hearing.[18]

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18. The importance in defining a meaningful standard for §1983 claims cannot be overemphasized in light of the tremendous numbers of civil rights cases that are brought in federal courts

SUR PETITION FOR REHEARING

Before GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and GARTH, Circuit Judges.

SLOVITER, Circuit Judge.

The petition for rehearing filed by Appellees, Upper Darby Township, Upper Darby Township Police Department, Diane Miller, individually and as Police Officer-Matron of Upper Darby Township, Martin Kerns, individually and as Police Commissioner of Upper Darby Township, and James J. Ward, individually and as Mayor of Upper Darby Township, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

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NOTES *(Continued)*

today. Whereas in 1960, only 280 suits were filed in federal court under all the civil rights acts, Levitt, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 Hofstra L.Rev. 265, 267 n. 13. (1987), by 1986 that number has grown to 40,970 or roughly one out of every six civil cases. *Annual Report of the Director of the Administrative Office of the United States Courts*, (1986). At the very least, the litigants who file, and the district court judges who must decide, these cases should be furnished with a reliable standard which affords uniformity and certainty in its application.

Judge Sloviter's suggestion, Maj. op. at 674, that because the Supreme Court has yet to explicitly define a standard for a due process based §1983 claim, that we should also forebear from doing so, is surprising. On her theory, no new legal or constitutional development could ever appear in other than a Supreme Court opinion, thereby rendering all inferior courts incapable of discharging their functions.

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

WEIS, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, would have granted rehearing.

GARTH, Circuit Judge, would grant the petition for panel rehearing for the reasons set forth in his following statement.

GARTH, Circuit Judge, dissenting:

As a Senior Circuit judge, I am permitted to vote only for panel rehearing and not for rehearing *in banc*. While it would appear that such a vote would be fruitless in light of the majority opinion, I nevertheless record my vote for panel rehearing because of the importance of this case.

In my panel dissent, I point out the need for giving content to a standard for a due process based §1983 cause of action. Such a standard is essential for the bar, the district court, and for future decisions of this court. Although I disagreed with the majority with respect to other aspects of the majority's opinion, i.e. failure to plead with the requisite specificity, recognition of a constitutional violation when the damage complained of was caused by the plaintiffs own hand, and failure to conform to Supreme Court precedent for municipal liability, there is very little question in my mind that the overriding issue for determination should be a meaningful and well defined standard §1983 standard.

The panel majority, by failing to specify such a standard, has in my opinion abdicated an essential function of an appellate court. It was for that reason that I urged rehearing *in banc* when I concluded my panel dissent. This court, by now denying rehearing, has endorsed the panel's failure to provide necessary instruction in this critical area.

Were I permitted to vote for rehearing *in banc*, I would do so. As a senior circuit judge, however, I am remitted to voting only for panel rehearing. I so vote.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebel-

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.

Historical Note

Codification. R.S. § 1979 is from Act Apr. 20, 1871, c. 22, §1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

1979 Amendment. Pub.L. 96-170 added "or the District of Columbia" following "Territory," and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment. Amendment by Pub.L. 96-170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub.L. 96-170, set out as an Effective Date of 1979 Amendment note under section 1343 of Title 28, Judiciary and Judicial Procedure.

Legislative History. For legislative history and purpose of Pub.L. 96-170, see 1979 U.S. Code Cong. and Adm.News, p. 2609.

Cross References

Citizenship clause, see U.S.C.A.Const. Amend. 14, §1.
Conspiracy to interfere with civil rights, damages for, see section 1985 of this title.
Jurisdiction of district courts of civil rights actions, see section 1343 of Title 28, Judiciary and Judicial Procedure.
Privileges and immunities clauses, see U.S.C.A.Const. Art. 4, §2, cl. 1 and Amend. 14. §1.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.
Rules as governing procedure in all suits of civil nature whether cognizable as cases at law or in equity or admiralty, see rule 1.

Library References

Civil Rights §13.5(1).. . .C.J.S. Civil Rights §§114, 115, 119, 124.

West's Federal Forms

Allegations of jurisdiction, see §§1057, 1060.
Complaint, see §§1849, 1850, 1850.10, 1851, 1851.5, 1852.5 to 1852.15.
Declaratory judgments, see §4781 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see §5271 et seq.
Three-judge courts, matters pertaining to, see §6051 et seq.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) WHEN PRESENTED. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more

definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the opinion of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given

reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUE ANN COLBURN, Adm. of the Est. of Melinda Lee Stierheim, dec.	:	CIVIL ACTION
v.	:	
UPPER DARBY TOWNSHIP, et al.	:	NO. 86-2132

FINAL ORDER

AND NOW, this 7th day of October, 1986, upon consideration of plaintiff's motion for reconsideration pursuant to Fed. R. Civ. P. 59, it is hereby ORDERED that plaintiff's motion is DENIED without prejudice to any state cause of action plaintiff may have for the following reasons:

1. Plaintiff contends that this court did not rule on the merits of her claim, but rather, dismissed the action improvidently because the court wrongfully believed that she had failed to respond timely. I did approve plaintiff's stipulation extending her time to respond to defendant's Rule 12(b)(6) motion. However, such stipulation crossed paths with the motion at the same time defendants' motion ripened and hence, I believed that a notation regarding a lack of opposition was appropriate. While the word "unopposed" was handwritten by me on defendants' proposed order, it did not appear without qualifying language. I did review the merits of defendants' motion. Finding the merits of defendants' motion persuasive, I ruled in their favor "for the reasons stated [in their motion]" and dismissed plaintiff's claim.

2. Under plaintiff's current complaint, police officer-matron Diane Miller is alleged to have "negligently, carelessly and recklessly" failed to search adequately decedent's person before she was detained in a holding cell. Compl. at ¶17. The poor search techniques used by officer Miller are alleged to rise to the level of plaintiff's decedent's constitutional injury. That is, Miller's failure to detect a handgun on decedent's person was the cause of her suicide. The remaining defendants are alleged to have "exhibited a custom of laxity" regarding the supervision and oversight of (1) strip search techniques (both training and in application) and (2) activity of potentially dangerous detainees within jail cells.

3. Officer Miller's failure to detect a handgun, even if it *was* located on decedent's person at the time of the frisk, does not rise to the level of a constitutional deprivation. Plaintiff has failed to suggest where the gun may have been located, whether plaintiff actually had the weapon on her person while she was searched or whether the officer had a reasonable suspicion that decedent was likely to be carrying a weapon. The facts as stated lack sufficient specificity to tie together the allegedly inadequate frisk and the subsequent suicide. "[A]n error in judgment, an unforeseeable tragic event, a good faith but misinformed professional decision, or mere negligence will not suffice to impose liability under §1983." *See Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 508 (3d Cir. 1985).

Moreover, Officer Miller is alleged to be part of the Upper Darby Police Force. She was clearly acting in her official capacity according to standard police procedure. This fact is unchallenged. Each member of the force is alleged to have "exhibited a custom of laxity" in the oversight of detainees. A

custom is not an official policy. Therefore, in order to show that the entity is liable under section 1983, plaintiff must establish an official practice of city officials so permanent and well-settled so as to have the force of law. *Monell v. New York City, Department of Social Services*, 436 U.S. 658, 691 (1978). A conclusory allegation that a municipal police force is lax in carrying out its duties is the exact type of negligent behavior the Supreme Court intended to exclude from the scope of section 1983 when it affirmed *Davidson v. O'Lone*, 752 F.2d 817, 828, 828 n.8 (3d Cir. 1984) (in banc), *aff'd sub nom. Davidson v. Cannon*, 106 S. Ct. 668 (1986). Further, the municipality's liability is limited to action for which it is *actually* responsible. *See City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). The extension of municipal liability to cover unforeseeable and tragic events caused directly by the superseding actions of a third party is beyond the realm of cognizable section 1983 violations.

4. Finally, plaintiff's section 1983 claim is based upon the eighth and fourteenth amendments. The eighth amendment protects *convicted prisoners* against cruel and unusual punishment. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). In the case before me, plaintiff was only under arrest when the alleged constitutional conduct occurred. She was not convicted of any crime. In fact, defendants appear to have taken her in in order to protect her. If so, does tort law protect her if they fail to exercise reasonable care in assuming such a duty? Accordingly, the eighth amendment is not available as a source of protection. In order to succeed, plaintiff must find another source of constitutional protection to state a claim under section 1983. Although the fourteenth amendment has been recognized in this circuit as a source of *protection for*

detainees, the court noted that when a plaintiff receives some medical care, the alleged inadequacy of such care will not support an eighth or a fourteenth amendment claim. *See Norris v. Frame*, 583 F.2d 1183, 1186 (3d Cir. 1979).

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUE ANN COLBURN, Administratrix of the Estate of MELINDA LEE STIERHEIM, Deceased, Plaintiff	:	
vs.	:	
	:	CIVIL ACTION
UPPER DARBY TOWNSHIP, UPPER DARBY TOWNSHIP POLICE DEPARTMENT, DIANE MILLER, Ind. and as POLICE OFFICER-MATRON OF UPPER DARBY TOWNSHIP, MARTIN KERN, Ind. and as POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP, and JAMES J. WARD, Ind. and as MAYOR OF UPPER DARBY TOWNSHIP,	:	NO. 86-2132
Defendants		

FINAL ORDER

AND NOW, this 23rd day of June, 1986, upon consideration of the unopposed Motion to Dismiss filed on behalf of Defendants, Upper Darby Township, Upper Darby Township Police Department, Diane Miller, Individually and as police officer-matron of Upper Darby Township, Martin Kern, Individually and as Police Commissioner of Upper Darby Township, and James J. Ward, Individually and as Mayor of Upper Darby Township, it is hereby ORDERED and DECREED that this Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) is GRANTED for the reasons stated therein and the Complaint of Plaintiff is hereby dismissed without prejudice to any state cause of action which the plaintiff may have.

BY THE COURT:

_____

James F. Giles
J.

ENTERED: 6-24-86

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

SUE ANN COLBURN, Administratrix of the Estate of MELINDA LEE STIERHEIM, Deceased	:	District EASTERN DISTRICT OF PENNA.
	:	Docket No.
v.	:	86-2132
UPPER DARBY TOWNSHIP, UPPER DARBY TOWNSHIP POLICE DEPARTMENT, DIANE MILLER, Ind. & as POLICE OFFICER-MATRON, OF UPPER DARBY TOWNSHIP, MARTIN KERN, Ind. & as POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP and JAMES J. WARD, Ind. & as MAYOR OF UPPER DARBY TOWNSHIP	:	To: (Name and Address of Defendant)

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

Joseph Pozzuolo, Esq.
2033 Walnut St
Phila. PA 19103

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk — Date

MICHAEL E. KUNZ
(By) Deputy Clerk

Carol A. Biedrzycki — 4/15/86

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUE ANN COLBURN, Administratrix of the Estate of MELINDA LEE STIERHEIM, Deceased, *Plaintiff*	:	CIVIL ACTION NO. 86-2132
	:	JURY TRIAL DEMANDED
vs.	:	
UPPER DARBY TOWNSHIP, UPPER DARBY TOWNSHIP POLICE DEPARTMENT, DIANE MILLER, Ind. and as POLICE OFFICER-MATRON OF UPPER DARBY TOWNSHIP, MARTIN KERN, Ind. and as POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP, and JAMES J. WARD, Ind. and as MAYOR OF UPPER DARBY TOWNSHIP, *Defendants*	:	

COMPLAINT

I. Parties

1. Plaintiff, Sue Ann Colburn is an individual residing at 1221 Lindale Avenue, Drexel Hill, Delaware County, Pennsylvania. She is Administratrix of the Estate of Melinda Lee Stierheim, deceased.

2. Letters of Administration were granted to Sue Ann Colburn as Melinda Lee Stierheim's mother by the Register of Wills of Delaware County on September 11, 1985. She sues as Administratrix of the Estate and on behalf of the decedent's minor daughter, Melinda Leigh Colburn.

3. The Plaintiff's decedent is Melinda Lee Stierheim, who, at the time of her death, was a 27 year old resident of Delaware County, Pennsylvania.

4. Defendant, Upper Darby Township, is a municipal corporation organized and existing under and by virtue of the laws of the State of Pennsylvania and is located in Delaware County, Pennsylvania and at all relevant times hereto, employed the Defendants, Diane Miller, Martin Kerns and James Ward as police officer-matron, police commissioner and mayor, respectively.

5. Defendant, Upper Darby Township Police Department, is a department and agency organized, existing and maintained by virtue of the actions of Defendant, Upper Darby Township, and is operated, controlled and maintained by Defendant, Upper Darby Township.

6. At all times relevant hereto, Defendant, Diane Miller, was a police officer-matron of Defendant, Upper Darby Township Police Department, and at all times herein was acting in such capacity as the agent, servant, and employee of Defendant, Upper Darby Township. She is sued individually and in her official capacity.

7. Defendant, Martin Kerns, is and was at all times described in this Complaint Police Commissioner of Defendant, Upper Darby Township. As such, he was the commanding officer of Defendant, Diane Miller, and was responsible for the training, supervision, and conduct of Defendant Diane Miller as more fully set forth below. He is sued individually and in his official capacity.

8. Defendant, James J. Ward is and was at all times described in this Compliant Mayor of Defendant, Upper Darby Township. As such, he is responsible for the overall training and conduct of Defendant, Upper Darby Township Police Department, including Defendant, Diane Miller, He is sued individually and in his official capacity.

9. At all relevant times hereto and in all their actions described herein, Defendants, Diane Miller, Martin Kerns and James J. Ward, were acting under color of state law and pursuant to their authority as police officer-matron, police commissioner and mayor of Defendant, Upper Darby Township.

II. Jurisdiction and Venue

10. This action is brought pursuant to Title 42 U.S.C. Section 1983 et. seq. and the Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. Sections 1331 and 1343(a) and the aforementioned statutory and constitutional provisions. Plaintiff further invokes pendent jurisdiction of this court to consider claims arising under state law.

11. The controversy exclusive of interest and costs exceeds the sum of $10,000.

12. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391(b) in as much as jurisdiction is not founded solely on diversity of citizenship, all defendants are residents of the Eastern District of Pennsylvania and the claim arose in the Eastern District of Pennsylvania.

III. Allegations of fact

13. On or about April 30, 1985, Defendant, Diane Miller, was assigned to duty on behalf of Defendant, Upper Darby Township with the responsibility for searching females who were taken into custody by Defendant, Upper Darby Township Police Department, for, among other things, contraband and hidden objects which persons taken into custody could use to injure themselves, including handguns.

14. At approximately 5:00 p.m. on April 30, 1985, Melinda Lee Stierheim was taken into custody by Defendant, Upper Darby Township Police Department, visibly intoxicated.

15. Melinda Lee Stierheim, dressed only in blue denim shorts and a halter top concealed a handgun in her possession as Defendant, Upper Darby Township Police Department, took her into custody and detained her in a jail cell.

16. Prior to placing Melinda Lee Stierheim in a jail cell, Defendant, Diane Miller, searched Melinda Lee Stierheim for, among other things, contraband and hidden objects which Melinda Lee Stierheim could use to injure herself.

17. Defendant, Diane Miller, negligently, carelessly and recklessly failed to adequately search Melinda Lee Stierheim, permitting her to retain possession of the handgun while detained in a jail cell of Defendant, Upper Darby Township Police Department.

18. As a direct and proximate result of Defendant, Diane Miller's, failure to adequately search Melinda Lee Stierheim, Melinda Lee Stierheim shot herself with the handgun at approximately 9:00 p.m. on April 30, 1985 and died at approximately 2:33 a.m. on May 1, 1985.

19. Melinda Lee Stierheim was the third person to commit suicide while in police custody at the Defendant, Upper Darby Township Police Department jail since November, 1982.

20. Defendants, Diane Miller, Martin Kerns, James J. Ward, Upper Darby Township and Upper Darby Township Police Department, have exhibited a custom of laxity regarding the supervision and monitoring of their jail cells and in searching individuals taken into police custody.

21. Defendants' failure to provide adequate supervision and monitoring of their jail cells and their failure to provide adequate training to police officers-matrons in searching individuals taken into police custody amounts to gross negligence and a deliberate indifference to the safety and lives of individuals taken into custody and detained by Defendants, Upper Darby Township and Upper Darby Township Police Department. This gross

negligence was a proximate cause of the death of Melinda Lee Stierheim.

22. Defendants, Upper Darby Township, Upper Darby Township Police Department, Mayor James J. Ward and Police Commissioner Martin Kerns, are directly liable and responsible for the negligence of Defendant, Diane Miller, because of Defendants repeated and intentional failure to adequately train police officers-matrons of Defendant, Upper Darby Township Police Department in the proper method of searching individuals taken into police custody and for their failure to instruct police officers in the proper supervision and monitoring of jail cells.

COUNT I — WRONGFUL DEATH

23. Plaintiff incorporates herein by reference paragraphs 1 through 22 inclusive, as though the same had been set forth more fully at length herein.

24. Upon the commitment of Melinda Lee Stierheim to the Defendant, Upper Darby Township Police Department jail it became the duty of each Defendant to exercise reasonable care for the safety, sake keeping and well being of Melinda Lee Stierheim.

25. Notwithstanding the duty owed to Melinda Lee Stierheim by Defendants and other agents, servants and employees of Defendants, Upper Darby Township and Upper Darby Township Police Department, acting within the scope of their employment, Defendants are guilty of one or more of the following acts or ommisions of negligence;

(a) Negligently, carelessly and recklessly failing to make an adequate search of Melinda Lee Stierheim and confiscate anything which she could use to injure herself including a handgun;

(b) Negligently, carelessly and recklessly failing to take from Melinda Lee Stierheim a handgun;

(c) Negligently, carelessly and recklessly failing to make cell checks of Melinda Lee Stierheim to adequately provide for her safety, safe keeping and well being;

(d) Negligently, carelessly and recklessly failing to closely restrain and constantly supervise Melinda Lee Stierheim when they knew or had reason to know from their observation that she was a suicidal risk;

(e) Negligently, carelessly and recklessly hiring, supervising, retaining, educating and training jail personnel as to the proper, most humane and safest methods for carrying out their duties;

(f) Negligently, carelessly and recklessly failing to exercise reasonable care for the preservation of Melinda Lee Stierheim's health and life under the circumstances; and

(g) Such other negligence, carelessness and recklessness as may be ascertained upon completion of discovery under the Federal Rules of Civil Procedure.

26. Melinda Lee Stierheim is survived by her infant child, Melinda Leigh Colburn, age 4, who was dependent upon Melinda Lee Stierheim and has sustained pecuniary damages from the death of her mother.

27. At the time of Melinda Lee Stierheim's death, she was 27 years of age with a life expectancy of more than forty-five years; she was in good health and had been employed profitably for some time as a part-time waitress at a weekly wage of approximately $90.00. The decedent intended to work full-time when her minor daughter was of school age.

28. By reason of Defendants' negligent, careless, and reckless actions more fully set forth above, Melinda Lee Stierheim's minor child has been deprived of the aid, association, support, protection, comfort, care, and

society of her mother and her share in such estate as her mother might have reasonably accumulated during her natural life expectancy.

WHEREFORE, Plaintiff, Sue Ann Colburn administratrix of the Estate of Melinda Lee Stierheim demands judgment against Defendants in an amount in excess of $10,000 for compensatory and punitive damages, plus interest, costs of suit and attorneys' fees.

COUNT II — SURVIVAL ACTION

29. Plaintiff incorporates herein by reference paragraphs 1 through 28 inclusive, as though the same had been set forth more fully at length herein.

30. Under the law of the Commonwealth of Pennsylvania, a cause of action in trespass on behalf of the Estate of Melinda Lee Stierheim is made out to recover damages for the injuries to Melinda Lee Stierheim and for losses as a result of those injuries, including the loss of her life and the pain and suffering decedent suffered prior to her death.

31. Melinda Lee Stierheim did not commence an action against Defendants prior to her death. Under the law of the Commonwealth of Pennsylvania, her cause of action survives, and may be, and is, brought as a survival action by Sue Ann Colburn as successor to her cause of action.

32. By reason of the aforesaid, Melinda Lee Stierheim has incurred various expenses for hospital and medical care and her Estate has incurred expenses for her funeral and interment.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount in excess of $10,000 for compensatory and punitive damages, plus costs of suit and attorney's fees.

COUNT III — CIVIL RIGHTS VIOLATION

33. Plaintiff incorporates herein by reference paragraphs 1 through 32 inclusive, as though the same had been set forth more fully at length herein.

34. Defendants' custom of laxity in supervising and monitoring their jail cells and, also, in searching individuals taken into police custody exhibited gross negligence in their duties and a deliberate indifference to the medical needs of Melinda Lee Stierheim when she was taken into police custody.

35. Defendants' gross negligence and deliberate indifference to Melinda Lee Stierheim's medical needs, all of which was committed under color of state law while said individual Defendants were acting under the authority issued to them by Defendants, Upper Darby Township and Upper Darby Township Police Department, was a direct and proximate result of Melinda Lee Stierheim's death and a violation of her rights under the laws and Constitution of the United States, in particular the Eighth and Fourteenth Amendments thereof and 42 U.S.C. Section 1983, et seq.

36. Pursuant to 42 U.S.C. Section 1988, Plaintiff is entitled to an award of reasonable attorney's fees for Defendants' wrongful actions.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount in excess of $10,000 for compensatory and punitive damages, plus interest, costs of suit and attorneys' fees.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1675

SUE ANN COLBURN, Administratrix of the Estate of MELINDA LEE STIERHEIM, Deceased
vs.
UPPER DARBY TOWNSHIP, UPPER DARBY TOWNSHIP POLICE DEPARTMENT, DIANE MILLER, Ind. and as POLICE OFFICER-MATRON OF UPPER DARBY TOWNSHIP, MARTIN KERNS, Ind. and as POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP and JAMES J. WARD, Ind. and as MAYOR OF UPPER DARBY TOWNSHIP

APPEAL FROM AN ORDER GRANTING APPELLEES' MOTION TO DISMISS APPELLANT'S COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(CIVIL NO. 86-2132)

BRIEF FOR APPELLANT

POZZUOLO & PERKISS, P.C.
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action was originally brought in the District Court pursuant to Title 42 U.S.C. Section 1983 et. seq. and the Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction was founded on 28 U.S.C. Sections 1331 and 1343 and the aforementioned statutory and constitutional provisions.

Jurisdiction on this appeal from the final order of the District Court is founded on 28 U.S.C. Section 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court erred in dismissing appellant's complaint and not requiring appellees to complete discovery and thereafter to permit appellant to amend her complaint, if necessary, where there have been no prior amendments to the complaint and no discovery where appellees have withheld from appellant all information and all investigative reports concerning appellant's decedent's death, and said information concerning appellant's decedent's death is in appellee's possession.

II. Appellant's complaint has plead deprivations of appellant's decedent's constitutional and civil rights by appellees to give rise to a cause of action under Title 42 U.S.C. Section 1983 sufficient to withstand dismissal.

A. Appellant has plead a cause of action under Title 42 U.S.C. Section 1983 against the Township of Upper Darby sufficient to withstand appellees' motion to dismiss.

B. Appellant has plead a cause of action under Title 42 U.S.C. Section 1983 against the Mayor and the Police Commissioner of Upper Darby Township sufficient to withstand appellees' motion to dismiss.

C. Appellant has plead a cause of action under Title 42 U.S.C. Section 1983 against the Upper Darby Township Police Department sufficient to withstand appellees' motion to dismiss.

D. Appellant has plead a cause of action under Title 42 U.S.C. Section 1983 against the Upper Darby Township Police Officer-Matron Diane Miller sufficient to withstand appellees' motion to dismiss.

STATEMENT OF THE CASE

Sue Ann Colburn, Administratrix of the Estate of Melinda Lee Stierheim, Deceased, brought this action against Upper Darby Township, Upper Darby Township Police Department, Diane Miller, Ind. and as Police Officer-Matron of Upper Darby Township, Martin Kerns, Ind. and as Police Commissioner of Upper Darby Township, and James J. Ward, Ind. and as Mayor of Upper Darby Township to recover damages arising by virtue of defendants' violations of Melinda Lee Stierheim's civil and constitutional rights which resulted in her death, as well as pendent state wrongful death and survior claims. In response to the complaint defendants filed a Motion to Dismiss which was granted by the United States District Court for the Eastern District of Pennsylvania. This appeal followed.

STATEMENT OF FACTS

Sue Ann Colburn, Administratrix of the Estate of Melinda Lee Stierheim, Deceased, brought suit against Upper Darby Township, Upper Darby Township Police Department, Diane Miller, Individually and as Police Officer-Matron of Upper Darby Township, Martin Kerns, Individually and as Police Commissioner of Upper Darby Township, and James J. Ward, Individually and as Mayor of Upper Darby Township to recover damages for federal statutory and constitutional violations committed by the defendants against Melinda Lee Stierheim, appellant's decedent, and for pendent state wrongful death and survival claims for the benefit of Ms. Stierheim's four (4) year old daughter, Melinda.

The complaint alleged that:

(1) At approximately 5:00 p.m., on April 30, 1985, Melinda Lee Stierheim was taken into custody by Appellee, Upper Darby Township Police Department, visibly intoxicated (par. 14);

(2) At the time Melinda Lee Stierheim was taken into custody she was dressed only in blue denim shorts and a halter top (par. 15);

(3) Appellee, Diane Miller, a police officer-matron for Appellee, Upper Darby Township Police Department, searched Melinda Lee Stierheim, prior to placing her in a jail cell for, among other things, contraband and hidden objects which Melinda Lee Stierheim could use to injure herself while detained in a jail cell (par. 16);

(4) Appellee, Diane Miller, failed to adequately search Melinda Lee Stierheim, permitting her to retain possession of a handgun while detained in the jail cell of Appellee, Upper Darby Township Police Department (par. 17);

(5) Appellee knew or should have known that Melinda Lee Stierheim was a suicidal risk (par. 25(d)); and

(6) While detained in the jail cell, Melinda Lee Stierheim shot herself with the handgun she had hidden on her person at approximately 9:00 p.m. on April 30, 1985 and died early the next morning (par. 18).

The complaint requested damages on behalf of the Estate of Melinda Lee Stierheim for civil rights violations, alleging, among other things, that: "Defendants' custom of laxity in supervising and monitoring their jail cells, and, also, in searching individuals taken into police custody *exhibited gross negligence in their duties and a deliberate indifference* to the medical needs of Melinda Lee Stierheim when she was taken into policy custody" (par. 34) (emphasis supplied).

While the following facts have not been plead, it was the intention of the appellant to develop and prove through discovery that Upper Darby Township, its police department and its officials, agents and employees were well acquainted with Melinda Lee Stierheim and her background. Melinda Lee Stierheim grew up in Upper Darby Township and was well known to defendants, Upper Darby Township and its Police Department as a result of her relationship, friendship and socialization with members of the "Warlocks" motorcycle gang and their and her use of firearms. In September of 1979, in a highly publicized case, a Delaware County jury found Ms. Stierheim not guilty, based on self defense, of shooting and killing her boyfriend. The decedent shot a member of the "Warlocks" when he tried to smash through her bathroom door in their apartment following a history of beatings to her. Further, Ms. Stierheim was known by the Upper Darby Township Police department because on at least three (3) other occasions Ms. Stierheim had confrontations with the police.

Other facts that the appellant intended to develop and prove through discovery are that on the date of her suicide, Melinda Lee Stierheim was extremely depressed because she was being evicted from her apartment and her relationship with her boyfriend, with whom she shared this apartment, deteriorated to such a point that on the day of her death she was forced to contact the local marital abuse center. In fact, on the Sunday morning before she died, April 28, 1985, after a heated argument with her boyfriend, in an attempt to flee from him, the decedent jumped out of the window of her apartment onto an adjoining roof. The Upper Darby Township Police were called to the scene. Further, Melinda Lee Stierheim had very obvious scars on her right wrist from a previous suicide attempt.

At the time she was detained by the Upper Darby Township police officer for alleged "public drunkenness," a mere "summary offense," the detaining officer had to stop Ms. Stierheim from swallowing three valium pills that were in her purse.

After Melinda Lee Stierheim was taken into custody, she was reportedly "patted-down" by appellee, police officer-matron, Diane Miller. During this pat-down, the matron found live ammunition in the pocket of Melinda Lee Stierheim's cut off blue jeans, but failed to remove the handgun which Ms. Stierheim had on her person. The police department reportedly only monitored Ms. Stierheim after they detained and incarcerated her in a jail cell by monitoring her on a video camera extremely infrequently, less than once an hour. The jail cell had numerous blind spots as a result of which the police department could not fully, completely, adequately and safely observe Ms. Stierheim in the jail cell. (Upon information and belief, appellees installed metal detectors at the jail cells at a cost of less than $100 after Ms. Stierheim's death to help alleviate Upper Darby Township's jail cell suicide problem. Appellant intended to develop and prove through discovery that Upper Darby

Township and Upper Darby Township Police Department had a serious suicidal problem concerning detainees in that three (3) detainees committed suicide while in their custody during the preceding twelve months.) Obviously, based on her history and the carrying of the ammunition at the time she was detained, the police department knew or should have known that it was extremely possible she was carrying a gun at the time she was picked up by the police.

In addition, shortly after her incarceration, at approximately 5:30 p.m., a close acquaintance and personal friend of Ms. Stierheim came to the police station to pick up Ms. Stierheim and take her to a safe nonpublic place. The Upper Darby Township Police refused to release Ms. Stierheim in the custody of her friend, even though she was being held allegedly for a summary offense for which Ms. Stierheim should not have been incarcerated in the first place. Three and one half hours later, Ms. Stierheim shot herself in the jail cell.

This death has been investigated by the appellees. Since Melinda Lee Stierheim's death, the township, the police department, the District Attorney's Office and the individual defendants have failed to disclose the results of their investigations to appellant or her counsel. Therefore, along with the complaint, appellant served on appellees preliminary discovery requests in the nature of interrogatories and requests for production of documents, copies of which are attached as exhibits to the appendix herein. This was the only way possible for the appellant to begin her investigation to determine what actually occurred between the police department and Melinda Lee Stierheim between 5:00 p.m. on April 30, 1985, the time she was taken into custody, detained, (not arrested), and 9:00 p.m. on the same date, the time she was found with a bullet in her head. This discovery has not been answered.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The instant cause has not been before this Court previously in a plenary fashion. Sue Ann Colburn, Administratrix of the Estate of Melinda Lee Stierheim, is unaware of any other case or proceeding which is in any way related, completed, pending or about to be presented before this Court.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review in this case is whether, as a matter of law, the trial court erred in dismissing appellant's complaint.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT AND NOT REQUIRING APPELLEES TO COMPLETE DISCOVERY AND THEREAFTER TO PERMIT APPELLANT TO AMEND HER COMPLAINT, IF NECESSARY, WHERE THERE HAVE BEEN NO PRIOR AMENDMENTS TO THE COMPLAINT AND NO DISCOVERY WHERE APPELLEES HAVE WITHHELD FROM APPELLANT ALL INFORMATION AND ALL INVESTIGATIVE REPORTS CONCERNING APPELLANT'S DECEDENT'S DEATH, AND SAID INFORMATION CONCERNING APPELLANT'S DECEDENT'S DEATH IS IN APPELLEES' POSSESSION.

While the District Court was of the opinion that appellant's complaint was not sufficiently specific to withstand dismissal, it is respectfully submitted that the District Court erred in dismissing the action. Rather than dismissing the action, the District Court should have permitted appellant the opportunity to take discovery and, if necessary, amend the complaint.

The appellees conducted a detailed and lengthy investigation into the death of Melinda Lee Stierheim, appellant's decedent. However, the township, police department, District Attorney's Office and the individual defendants have refused to disclose the results of their investigation to appellant or her counsel.

Therefore, along with the complaint, appellant served defendants with preliminary discovery requests in the nature of interrogatories and request for production of documents, copies of which are set forth in the Appendix. These preliminary discovery requests were designed to obtain the preliminary basic information appellant had attempted to obtain without success prior to filing suit, including, but not limited to, results of appellees' investigation of Ms. Stierheim's death. Suffice

it to say that appellees have refused to give any information whatsoever as to exactly what transpired inside the Upper Darby jail house on the evening of April 30, 1985, nor would appellees disclose the names of individuals who were present at the jail house who may have knowledge concerning the incident. The discovery served with the complaint has never been answered by appellees.

It is well-settled in this Third Circuit that where a plaintiff fails to plead a civil rights action with requisite specificity, or a plaintiff has failed to plead facts or circumstances which would suggest transgressions of his constitutional rights and Title 42 U.S.C. Section 1983, the plaintiff should be permitted the opportunity to amend his complaint and specify the basis for his civil rights claim.

This Third Circuit Court of Appeals refused to uphold dismissal of a civil rights complaint in *Ross v. Meagan,* 638 F.2d 646, 650 (3d Cir. 1986) stating that:

> "[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs . . .
>
> "We also have held consistently, however, that failure to permit amendment of a complaint dismissed for want of specific allegations constitutes an abuse of discretion." (citations omitted).

In *Ross,* the District Court's order was reversed and remanded with instructions to permit the appellants to amend their civil rights complaint with respect to a former governor and former police detective, setting forth the specific conduct that caused them harm under Title 42 U.S.C. Section 1983. That court was not shy when it went on to mention the heavy burden that the appellants faced if they were to prove official misconduct

before they may recover damages and the fact that they would also have to withstand additional summary judgment motions. *Id.* at 650. The court held that the appellants must be permitted a second opportunity to submit a complaint setting forth a claim upon which relief could be granted. *Id.* at 650.

Other cases in this circuit and district supporting this identical practice are: *Zynn v. O'Donnell*, 688 F.2d 940 (3d Cir. 1982); *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Silo v. City of Philadelphia*, 593 F.Supp. 870 (E.D.Pa. 1984) (remedy for failure to plead an official policy with adequate specificity is, in this district, typically a grant of time to substantiate the overly general pleadings, rather than a dismissal); *Bartholomew v. Fischl*, 534 F. Supp. 161, 165 (E.D.Pa. 1981) (holding that where a complaint is "unclear as to the theory naming the City of Allentown as a defendant, plaintiff was afforded fifteen (15) days leave to amend his complaint to plead requisite factual specificity").

In addition, case law in other circuits is replete with opinions holding that it is an abuse of discretion to dismiss a complaint claiming violations of federal constitutional or statutory rights prior to discovery. For example, in *United States ex rel Woodward v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985), the court held that:

> "Even in ordinary civil suits, when the evidence necessary to prove a plaintiff's case is necessarily in the possession of a defendant, a judgment of dismissal may not be entered until the plaintiff has had an opportunity through discovery to determine whether such evidence exists."

In *Murray v. City of Chicago*, 634 F. Supp. 365, 636 (7th Cir. 1980), the court overturned dismissal of a case prematurely stating:

> "It seems clear that appellant sustained a violation of constitutional rights by being arrested and detained

> pursuant to an invalid warrant. The defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice. Plaintiff should be entitled to discovery in order to determine who is the true culprit responsible for the wrong done to her. It would be premature to deny appellant relief at this present stage of the case, in advance of discovery or trial."

In *Chambers Development Co., Inc. v. Browning-Ferris Industries*, 590 F. Supp. 1528, 1538-39 (W.D.Pa. 1984) where plaintiff failed to allege with factual specificity conspiracy and fraud charges under RICO, the court took the view that "*the draconian result of dismissal*" should not be automatic particularly where facts underlying the claim were within the exclusive control of the defendants. Until those facts were uncovered through discovery, the allegations could not have been made more specific, and the court granted plaintiff sixty (60) days to take discovery. Thereafter plaintiff would be permitted to file an amended complaint.

In *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 536 F. Supp. 1065, 1071 (E.D.Pa. 1982), the court held:

> ". . . a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. And in anti-trust cases, *where 'the proof is largely in the hands of the alleged conspirators'*, dismissal prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." (citations omitted) (emphasis added).

In *Commonwealth of Pennsylvania v. Derry Construction Co., Inc.*, 617 F. Supp. 940, 942 (W.D.Pa. 1985), the Western District of Pennsylvania addressed the situation where plaintiff's complaint lacked specificity as follows:

> "We therefore conclude that plaintiff's complaint lacks specificity with regard to both its anti-trust and RICO claims. We further conclude, however, that the proper remedy in this situation is not to immediately require a more definite statement since, as we have previously noted, the facts sought by the defendant may be within their knowledge and control.
>
> "Instead, in turning once again to the opinion in *Chambers, a period of discovery will be allowed, after which the plaintiff will be permitted to file an amended complaint which meets the requirements of F.R.C.P. 9(b).*" (emphasis added).

See also, *Denny v. Carey*, 72 F.R.D. 574, 578 (E.D.Pa. 1976) (once plaintiff has satisfied the minimum burden of the rules governing the stating of averments of fraud or mistake, plaintiff should be allowed to flesh out allegations in complaint through discovery); *Durkin v. Bristol Township*, 88 F.R.D. 613, 616 (E.D.Pa. 1980) (holding that until the complaint was amended, dismissal was inappropriate).

In *Skrocki v. Caltabiano*, 505 F. Supp. 916, 919 (E.D.Pa. 1981), the court refused to dismiss plaintiff's civil rights complaint that charged a conspiracy under civil rights statute section 1983, holding that:

> "Notwithstanding these grave doubts concerning the existence of any protectible property interests in plaintiff's employment, to dismiss the complaint at this early stage in the proceedings could conceivably offend the generous construction which Section 1983 should be afforded in order to augment the

> congressional purpose of providing a remedy and vehicle for vindication of 'cherished constitutional guarantees.' . . . Allowing discovery to proceed with the possibility of subsequent motions for summary judgment seems to be a fairer way to resolve the question." (citations omitted).

Finally, in *Villante v. Department of Corrections*, 786 F.2d 516, 521 (2d Cir. 1986), holding for appellants on appeal, the court reversed and remanded a converted summary judgment motion to permit additional discovery on a section 1983 complaint and held:

> "Where the plaintiffs claim could only succeed upon a showing of actual or constructive knowledge on the part of supervisory personnel and where facts solely in the defendant's control were therefore at the heart of the necessary proof, the district court's failure to order compliance with the plaintiff's request for deposition discovery was an especially crippling blow.
>
> "We hold that the district court's failure to order deposition discovery of any of appellee's officials was an abuse of discretion which deprived Villante of an adequate opportunity to respond to the converted summary judgment motion."

Appellees are police-wise and street-smart. Appellees are professionally trained in the court system, dealing with court cases every day of their lives. They know how to block and possibly forever stifle investigations to thwart valid and viable claims against them. Appellees have refused to disclose to appellant the results of their investigation into the death of Melinda Lee Stierheim and have not answered appellant's discovery. By dismissing appellant's complaint the District Court has permitted the appellees to continue to shield their wrongdoings from disclosure to the parties harmed and lock their filing cabinets forever.

Appellant, through no fault of her own, may have failed factual specificity in her complaint, because the detailed information necessary to specifically allege all the facts that occurred have been kept from her by appellees. What should have been quashed as a "You can run but you cannot hide" policy of appellees has now been upheld by the District Court as an unjust quagmire that will forever bar appellant from further discovery, proper amendment, and the chance for her day in federal court.

Accordingly, it is respectfully submitted that appellant has alleged in her complaint all basic requirements necessary to set forth a claim for violation of Melinda Lee Stierheim's civil and constitutional rights (See Section II of this brief) by specifically alleging: (a) that appellees "gross negligence" and "deliberate indifference" to Ms. Stierheim's rights resulted in Ms. Stierheim's death (par. 34 and 35); and (b) that appellees "gross negligence" and "deliberate indifference to the safety and lives of the individuals taken into custody and detained by defendants" resulted in Ms. Stierheim's death (par. 21).

Based on the foregoing, since the complaint sets forth the minimum basic requirements to establish a section 1983 claim, it is respectfully submitted that the District Court abused its discretion in dismissing appellant's complaint. The proper course of action is to require appellees to complete discovery and, thereafter, if necessary, permit amendment of appellant's complaint.

II. APPELLANT'S COMPLAINT HAS PLEAD DEPRIVATIONS OF APPELLANT'S DECEDENT'S CONSTITUTIONAL AND CIVIL RIGHTS BY APPELLEES TO GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 SUFFICIENT TO WITHSTAND DISMISSAL.

Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss a cause of action if the complaint fails to state a claim upon which relief may be granted. "For the purpose of reviewing this motion to dismiss, *the material allegations of the complaint are taken as true. . . . The complaint is to be liberally construed in favor of the plaintiff.* . . . This standard mandates that we reverse the dismissal 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1439 (11th Cir. 1985) (citations omitted) (emphasis added). See also, *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977) and *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (where this court stated that "summary disposition on the merits is disfavored"); *Durkin v. Bristol Township*, supra.; *Kuchka v. Kile*, 634 F. Supp. 502, 506 (M.D. Pa. 1985); *Groff v. Eckman*, 525 F. Supp. 375 (E.D. Pa. 1981).

The United States Supreme Court has held that the Federal Rules of Civil Procedure merely require that a complaint give "*fair notice*" of plaintiff's claims to the defendant. See *Conley v. Gibson*, 335 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957), where the court held:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that

> the Federal Rules ~~of Civil~~ Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be construed as to do substantial justice', we have no doubt that petitioners' complaint adequately sets forth a claim and gave the respondents fair notice of its basis. *The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.*" (citations omitted) (emphasis added).

See also, *Kedra v. City of Philadelphia*, 454 F.Supp. 652, 675 (E.D.Pa. ~~1978)~~ where the court upheld the sufficiency of plaintiff's section 1983 complaint stating:

> "In applying the standard, the liberal notice pleading policy of the Federal Rules must be kept in mind, and so long as a claim has some semblance of factual support it should not be dismissed . . ."

See also, *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, supra.

It is respectfully submitted, as more fully set forth hereinafter, that appellant's complaint sets forth "a short and plain statement of the claim" which gives appellees

"fair notice" sufficient to withstand dismissal. Accordingly, it is respectfully submitted that the District Court erred in dismissing appellant's complaint.

Count III of appellant's complaint entitled "Civil Rights Violation", alleges that:

> "34. Defendants' custom of laxity in supervising and monitoring their jail cells and, also, in searching individuals taken into custody exhibited *gross negligence* in their duties and a *deliberate indifference* to the medical needs of Melinda Lee Stierheim when she was taken into police custody.
>
> "35. Defendants' *gross negligence* and *deliberate indifference* to Melinda Lee Stierheim's medical needs, all of which was committed under color of state law while said individual Defendants were acting under the authority issued to them by Defendants, Upper Darby Township and Upper Darby Township Police Department was a direct and proximate result of Melinda Lee Stierheim's death and a violation of her rights under the laws and Constitution of the United States, in particular the Eighth and Fourteenth Amendments thereof and 42 U.S.C. Section 1983, et seq." (emphasis added).

In addition, Count III incorporates all other allegations in the complaint, including that the decendent's death was a direct and proximate result of: (1) appellees' failure to properly search Melinda Lee Stierheim (par. 17 and 18); (2) appellees' failure to adequately supervise and monitor their jail cells (par. 20 and 21); and (3) appellees' failure to provide adequate training to police officers-matrons in searching individuals taken into custody, all of which amounts to "*gross negligence*" *and a* "*deliberate indifference to the safety and lives of the individuals taken into custody and detained by defendants*" (par. 21). The complaint further alleges that

appellees, Upper Darby Township, Upper Darby Township Police Department, Mayor James J. Ward and Police Commissioner Martin Kern *repeatedly and intentionally* failed to adequately train police officers-matrons in the proper method of searching individuals taken into police custody and failed to instruct police officers-matrons in the proper supervision and monitoring of jail cells (par. 22).

In *Riley v. Jeffes*, 777 F.2d 143, 145 (3d Cir. 1985) the court stated:

> "[A] section 1983 action requires that (1) the conduct complained of must be committed by a person acting under color of state law and, (2) it must have deprived the plaintiff of a right or privilege secured by the Constitution or the laws of the United States." (citations omitted).

It is respectfully submitted that the aforesaid allegations, based on *Riley*, and as more fully explained hereinafter, are sufficient to establish a facially valid claim under the Due Process Clause of the Fourteenth Amendment of the United States Constitution[1] and 42 U.S.C. Section 1983,[2] et. seq.

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1. Appellant concedes that since her decedent was not convicted of any crime there is no Eighth Amendment claim. However, the Eighth Amendment can be used by analogy, since appellant's decedent was a pre-trial detainee, to set out appellant's decedent's Fourteenth Amendment claims. See *Norris v. Frame*, 585 F.2d 1183 (3d Cir. 1978); *Matje v. Leis*, 571 F. Supp. 918 (S.D.Ohio 1983); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976); *Guglielmoni v. Alexander*, 583 F.Supp. 821 (D.Conn. 1984).

2. 42 U.S.C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

In *Norris v. Frame,* supra., this circuit upheld a detainee's claim that his constitutional rights were violated when the detainee was not permitted to continue with a methadone treatment program approved by the Commonwealth of Pennsylvania, holding:

> "The protection afforded convicted felons under the eighth amendment is often used "by analogy" in determining the protection to be afforded detainees under the fourteenth amendment. *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1079-80 (3d Cir. 1976). The two levels of protection, however, should not be thought of as co-extensive. Courts have used eighth amendment cases for pretrial detainees because detainees have often alleged that they are confined under conditions worse than those prevailing for convicts. . . . In such cases, the eighth amendment standard may be taken as a legitimate starting point because, as this Court noted in *Hampton v. Holmesburg Prison Officials,* supra., '[i]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted.' 546 F.2d at 1079-80.
>
> "However, cases forbidding the imposition on a detainee of conditions or deprivations that would constitute 'cruel and unusual punishment' if inflicted on a convict should not be read to limit a detainee only to that level of protection. Although a convict is not wholly stripped of his constitutional rights when he is imprisoned, he is subject to punishment by the state, and part of that punishment is deprivation of his liberty. A detainee on the other hand, may not be 'punished' at all. He is

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liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Due Process Clause of the Fourteenth Amendment provides: [N]or shall any State deprive any person of life, liberty, or property, without due process of law."

> entitled to such liberty as does not undermine the legitimate state interest related to his detention. The fourteenth amendment, therefore, must be read so as to recognize the distinct status of a pretrial detainee: a citizen not yet convicted, yet at the same time not possessing the full range of freedoms of an unincarcerated citizen. To limit his constitutional rights to a protection from cruel and unusual punishment would be to rely completely on an analogy to a constitutional provision that is not truly applicable at all. . . .
>
> "The one legitimate state interest that can warrant a deprivation of a detainee's liberty is the same interest that justifies the detention itself. Thus, this Court has stated that 'the only legitimate state interest in the detention of an accused who cannot raise bail is in guaranteeing his presence at trial.'. . . Society has found it necessary to confine detainees in cases where there are significant doubts about their appearance at trial. Additional restrictions imposed on detainees are defensible only when they can be justified by the requirements of prison administration, or inherent in the nature of confinement. If the added burdens do not meet this standard, they violate the detainee's constitutional right to due process of law." (citations omitted in part). 585 F.2d at 1187.

See also, *Bell v. Wolfish,* 441 U.S. 520, 535, n16, 99 S.Ct. 1861, 60 L.Ed. 2d 447 (1979).

In sum, the law of this circuit dictates that a detainee is afforded the greatest degree of constitutional right to due process of law under the fourteenth amendment. Since Melinda Lee Stierheim was being detained in a jail cell by appellees improperly, solely as the result of her alleged "public drunkenness", a summary offense, [and hopefully for no other purpose, such as to interrogate her while she was drunk and depressed

concerning her knowledge of the "Warlocks", et al., Melinda Lee Stierheim was entitled to the highest standard of constitutional due process protection.

Accordingly, in the case at bar, appellant's complaint clearly and unequivocally alleges that Melinda Lee Stierheim's death was caused by appellees' "deliberate indifference" to her civil and constitutional rights, when appellees "knew or had reason to know from their observation that she was a suicidal risk" (par. 25(d)) in that:

1. Appellees failed to properly search Ms. Stierheim and permitted her to maintain possession of a gun in the jail cell while intoxicated (par. 17 and 18);

2. Appellees failed to adequately supervise and monitor their jail cells (par. 20 and 21);

3. Appellees failed to adequately train police officers-matrons in searching individuals taken into custody (par. 21);

4. Appellees failed to adequately train police officers-matrons in the proper method to supervise and monitor jail cells (par. 22); and

5. Appellees have exhibited a custom of laxity in supervising and monitoring their jail cells and searching individuals taken into custody (par. 20).

Accordingly, it is respectfully submitted that appellant's complaint clearly and unequivocally sets forth sufficient allegations at this stage of the proceedings concerning violations of decedent's fourteenth amendment and 42 U.S.C. Section 1983 rights to give the appellee's fair notice of appellant's claim and to survive appellant's motion to dismiss. Therefore, the District Court erred in dismissing appellant's complaint.

A. APPELLANT HAS PLEAD A CAUSE OF ACTION UNDER TITLE 42 U.S.C. SECTION 1983 AGAINST THE TOWNSHIP OF UPPER DARBY SUFFICIENT TO WITHSTAND APPELLEES' MOTION TO DISMISS.

In *Monell v. Department of Social Services of New York,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that municipalities can be sued directly under section 1983 for monetary, declaratory or injunctive relief, recognizing that local governments and municipal corporations are "persons" subject to liability under section 1983. In so holding, the court stated:

> "it is when execution of a government's policy or custom, whether made by its lawmakers or by those edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983." *Id.* 436 U.S. at 694.

In *Pembaur v. City of Cincinnati,* 475 U.S. , 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) the Supreme Court reviewed its holding in *Monell,* discussing:

> "*Monell* is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under [section] 1983 for deprivations of federal rights . . . In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior* . . .
>
> "The conclusion that tortious conduct, to be the basis for municipal liability under [section] 1983, must be pursuant to a municipality's 'official policy' is contained in this discussion. The 'official policy' requirement was intended to distinguish acts of the

> *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered." *Id.* 89 L.Ed.2d at 462-463.

An official policy can be inferred from a municipality's omissions, where officials had knowledge of a pattern of constitutionally offensive acts by subordinates but failed to take remedial steps. *Estate of Bailey v. County of York,* supra. *Turpin v. Mailet,* 619 F.2d 196 (2d Cir. 1980), *cert. denied* 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). Such omissions, however, are actionable only if they constitute "deliberate indifference" or "tacit authorization" of constitutional injuries. *Id.* 619 F.2d at 202.

See also, *Estate of Bailey v. County of York,* 768 F.2d at 508 where Circuit Judge Slovitor held that:

> "The allegations of the complaint may be fairly read to allege conduct rising to the level of deliberate indifference, reckless disregard, or gross negligence. . . . They therefore adequately meet the standard of conduct encompassed by section 1983."

As previously stated, it is respectfully submitted that appellant's complaint sets forth the requisite allegations to establish a cause of action against Upper Darby Township in paragraphs 17 through 22, 34 and 35 of appellant's complaint. Those paragraphs allege a "deliberate indifference" on the part of Upper Darby Township and its officials to the constitutional rights of detainees, including, appellant's decedent, with respect to constitutionally defective search, monitoring and training policies used in Upper Darby Township's jail cells. Those constitutionally defective policies led to the suicide

deaths of three (3) persons, including appellant's decedent, while detained in appellee's jail cells.

This Third Circuit has held that nothing in the language of section 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984) (In Banc), *Aff'd Sub nom. Davidson v. Cannon*, U.S. , 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

Circuit Judge Slovitor stated:

> "We thus reaffirm that actions may be brought in federal court under section 1983 where there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference of an established state procedure." *Id.* 752 F.2d at 828.

As further evidence that the Third Circuit legal theories set forth in *Davidson* is still proper authority Justice Brennan, in his dissent in *Davidson*, stated:

> "I agree with the court that merely negligent conduct by a State official, even though causing personal injury, does not constitute a deprivation of liberty and of the due process clause. I do believe, however, that official conduct which caused personal injury due to the *recklessness or deliberate indifference*, does deprive the victim of liberty within the meaning of the 14th Amendment." (emphasis added) 106 S.Ct. at 671.

It is respectfully submitted that the District Court erred in dismissing appellant's complaint against Upper Darby Township stating: "the extension of municipal liability to cover unforseeable and tragic events caused directly by the superceding actions of a third party is beyond the realm of cognizable section 1983 violations." (District Court Opinion at p. 42, infra.)[3] This negligence

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3. The District Court relied on *Estate of Bailey v. County of York*, supra, in dismissing appellant's complaint. In that case,

standard is clearly and unequivocably not the basis for determining the propriety of a section 1983 claim against a municipality. Irrespective of this standard, appellant's section 1983 claims allege gross negligence, conduct amounting to recklessness and a deliberate indifference on the part of all appellees to the rights of Melinda Lee Stierheim under the Fourteenth Amendment, which was a direct and proximate cause of Stierheim's death. (Par. 35). Further, the complaint clearly and unequivocally alleges that Upper Darby Township had an official policy sanctioned by supervisory officials, who had knowledge of constitutionally offensive acts by subordinates which led to three (3) suicides and failed to take remedial steps until it was too late for Melinda Lee Stierheim.[4]

The pattern of culpable conduct necessary to make out a section 1983 that has emerged in the United States Supreme Court and the various circuits and districts remains at the level of gross negligence or deliberate indifference to plaintiff's constitutional rights.

In *Sager v. City of Woodland Park*, 543 F. Supp. 282, 289 n5 (D. Col. 1982), in upholding the plaintiffs' claims, the court set forth the rule with respect to liability for inadequate training of police officers as follows:

> "While merely negligent failure adequately to train, supervise and control police officers is not sufficient to render a municipality and supervisory personnel

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Circuit Judge Slovitor overturned the lower court's dismissal of a section 1983 complaint holding: "We have concluded that this case cannot be dismissed on the pleadings . . . Although as we have made clear, plaintiffs will have difficult burdens with respect to each of the issues discussed above before they can recover, *we are obliged to give them the opportunity to prove their case*" 768 F.2d at 511.

4. For purposes of this motion this is admitted as true. See *Fundiller v. City of Cooper City*, supra.

> liable under section 1983 for deprivation of constitutional rights resulting from police brutality, such potentional defendants may be liable where training or supervision is '*so reckless or grossly negligent* that future police misconduct is almost inevitable.' " (citations omitted) (emphasis added).

In *Madden v. City of Meriden*, 602 F. Supp. 1160, 1168 (D. Conn. 1985), the court denied a motion to dismiss a jail cell pretrial detention suicide case against the City of Meriden. In so doing the court stated:

> "[T]he municipality may be liable for its own acts or omissions which amount to a 'deliberate indifference' to a person's constitutional rights . . . The first count alleges acts or omissions of sufficient specificty to hold the City liable under section 1983. The City is alleged to have failed to provide training to its police officers to deal with suicidal detainees; that it failed to provide regulations and procedures to assure the safety of detainees with known histories of self-injury; and that it failed to maintain prison monitoring equipment in operating condition. These are all specific and readily verifiable charges which, if true, allow a finding that the City was grossly negligent or showed a deliberate indifference to the constitutional rights of severely emotionally impaired detainees".

See also, *Fiacco v. City of Rensselaer*, 783 F.2d 319, 321 (2d Cir. 1986) (holding that a pattern of negligent supervision of municipal employees, if proven, was sufficient as a matter of law to establish the existence of the "policy" that was prerequisite to the imposition of municipal liability under section 1983); *Villante v. Dept. of Corrections of New York*, supra, 786 F.2d at 523 (summary judgment reversed where genuine issues of material facts existed as to appellees' gross negligence or willful indifference, particularly with regard to alleged

failure to train and supervise and to monitor prison conditions). *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir. 1979) (holding that failure to train or supervise law enforcement officers which is so grossly negligent as to constitute deliberate indifference is sufficient to order to hold county liable).

It is respectfully submitted that appellant's allegations in her complaint clearly and unequivocally allege deliberate indifference and gross negligence sufficient to withstand dismissal at this early stage of the proceedings. Further, the complaint clearly and unequivocally alleges that Upper Darby Township had an official policy sanctioned by supervisory officials, who had knowledge of constitutionally offensive acts by subordinates which led to three (3) suicides and failed to take remedial steps until it was too late for Melinda Lee Stierheim.[5]

Appellant has not alleged in her complaint a single, random, unauthorized act, but a pattern of official and tacit acquiescence by all defendants, including the municipality, in the face of a known, dreadful track record of constitutional violations. Following discovery, appellant would have been able to prove at trial unconstitutional policies establishing a deliberate indifference to constitutional rights so as to render Upper Darby Township liable under appellant's civil rights action. Appellant's complaint should never have been dismissed at the pleading stage, prior to discovery, where it has plead this type of conduct and custom.

Therefore, Appellant respectfully requests that the order of the District Court be reversed.

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5. See footnote 4.

B. APPELLANT HAS PLEAD A CAUSE OF ACTION UNDER TITLE 42 U.S.C. SECTION 1983 AGAINST THE MAYOR AND THE POLICE COMMISSIONER OF UPPER DARBY TOWNSHIP SUFFICIENT TO WITHSTAND APPELLEES' MOTION TO DISMISS.

Where a superior is responsible for establishing a policy which causes constitutional injury to the claimant, the supervisor can be held liable for acts causing injury to the claimant. *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976).

53 Pa. C.S.A. Section 46121 provides in part:

> "The borough counsel may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties."

In *Sims v. Adams*, supra, the court overruled the lower court's grant of a motion to dismiss, holding that the complaint stated a cause of action against the mayor and chief of police as follows:

> "Sims' principal argument on appeal is that it was improper to dismiss the supervisory defendants. We agree. The propriety of the dismissal must be judged by a standard all too familiar to appellate courts: a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proven in support of his claim.
>
> * * * *
>
> ". . . The proper question is therefore whether the complaint adequately alleges the requisite causal

connection between the supervisory defendants' actions and a deprivation of plaintiff's constitutional rights.

* * * *

". . . We believe that the complaint states a cause of action against the two Police Committees based on the breach of their duty to discipline policemen whose recent culpable conduct had been brought to their attention." *Id.* at 831-832.

In *Schweiker v. Gordon*, 442 F. Supp. 1134, 1140 (E.D. Pa. 1977), in reviewing a theory of liability against the police commissioner of Philadelphia under a civil rights violation pursuant to an official policy, Chief Judge Luongo held that:

"If O'Neill knew that these two policemen were engaged in a continuous practice of unconstitutional conduct and nevertheless refused to take any action to rectify that situation, he could be held personally accountable for his intentional failure to prevent civil rights violations by these policemen."

In *Kedra v. City of Philadelphia*, supra., Chief Judge Luongo again held that:

"Plaintiff's theory in this case presents an even stronger case for imposing liability — actual control and supervision of the subordinate wrongdoers as they performed their wrongful acts. There can be no doubt that if a supervisor directs a subordinate to interfere with the rights of another, the supervisor should be held liable for his actions." *Id.* 454 F. Supp. at 674-675.

In *Fundiller v. City of Cooper City*, supra., the court unequivocally stated:

"Supervisory liability is not limited, however, to those incidents which the supervisor personally

> participates in the deprivation. . . . There must be a causal connection between the supervisory official and the alleged deprivation. . . . This causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision, and the official fails to take corrective action." *Id.* 777 F.2d at 1443. (citations omitted).

In *Dobson v. Green*, 596 F.Supp. 122, 125 (E.D.Pa. 1984) District Judge Bechtle stated that:

> "Supervisory officials can be held liable under section 1983 for conduct of their subordinates of plaintiff can show that the supervisory officials had some specific knowledge of *unconstitutional conduct* and intentionally acquiesced in the conduct by failing to establish proper procedures or train and supervise subordinates adequately." (citations omitted).

See also *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir.1981), cert. denied, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982) (holding that the court shall focus on the degree to which [the police chief] participated in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement); *Murray v. Murphy*, 441 F.Supp. 120, 124 (E.D. Pa. 1977) (holding that a complaint stated a cause of action against city officials who supervise police officers on theory that they had condoned and justified police conduct where said officers had knowledge of officers' past unconstitutional conduct). See also *Paul v. John Wanamaker, Inc.*, 539 F. Supp. 219 (E.D. Pa. 1984).

53 Pa. C.S.A. 46121 clearly places responsibility on the mayor to establish policy. Further, the mayor's decisions are effectuated through the chief of police. (Upper Darby Township has no chief of police. Rather the head official of Upper Darby Township Police Department is Police Commissioner Kern). As cited above,

policy decisions need not be affirmative actions. Failure to act can also impose liability on supervisory personnel.

It is respectfully submitted that appellant's complaint should survive a motion to dismiss at this early stage of the proceeding. See, e.g., *Sims v. Adams*, supra. Appellant has sufficiently alleged that appellees repeatedly and intentionally failed to adequately train their subordinates. This is especially true in light of the fact that we are dealing with a small municipal township where it is extremely difficult, if not impossible, to believe that the police commissioner and mayor did not have actual knowledge of *two previous suicides in Upper Darby Township jail cells*[6] (emphasis added). In fact, Melinda Lee Stierheim's suicide was significant enough to make front page headlines of the Delaware County Times.

Such past tragic suicide events in a small municipality would not go unreported to supervisory personnel. In fact, if it did go unreported to supervisory personnel, then the supervisory inadequacies would be far more grossly negligent, reckless and deliberately indifferent than anticipated. It is respectfully submitted that knowledge of prior suicides in Upper Darby Township jail cells can be judicially imputed to the mayor and police commissioner. If the complaint against the supervisory personnel is dismissed, without at least minimal discovery taking place, it is respectfully submitted that responsible authorities may never be asked to justify their

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6. With the most basic of third hand discovery completed by the appellant at this early stage of the proceeding, the appellant is aware of a minimum of two (2) other suicides during the twelve (12) months preceding the appellant's death. It is impossible to predict with accuracy other serious or fatal injuries or deaths or even attempts which precede the death of appellant's decedent. It is only through discovery that the appellant can expand and develop this with certainty. However, for purposes of this motion, appellees admitted that there were three (3) suicides within twelve (12) months in this small local jail cell. See, *Fundiller v. City of Cooper City*, supra.

decision to act or not to act with respect to repeated suicides in Upper Darby Township jail cells.

Accordingly, it is respectfully submitted that the elements necessary to hold the Upper Darby Township mayor and police commissioner liable under Title 42 U.S.C. Section 1983 have been properly plead. Therefore, a reasonable person, upon viewing evidence to be adduced at trial, could find these defendants liable under Count III of appellant's complaint. It is therefore respectfully requested that the district court order dismissing appellant's complaint be reversed.

C. APPELLANT HAS PLEAD A CAUSE OF ACTION UNDER TITLE 42 U.S.C. SECTION 1983 AGAINST THE UPPER DARBY TOWNSHIP POLICE DEPARTMENT SUFFICIENT TO WITHSTAND APPELLEES' MOTION TO DISMISS.

In *Paul v. John Wanamakers, Inc.*, supra., 539 F. Supp. at 222, an action was brought against the Philadelphia Police Department for deprivation of plaintiff's rights by failure to properly treat his epileptic condition while in police custody. District Judge Katz held:

> "The complaint names . . . the Philadelphia Police Department as defendant[s] and alleges that the Philadelphia Police Department failed to instruct its employees 'as to the proper procedure when arresting epileptics or otherwise failed to inforce [sic] their [sic] procedures and directives.' "
>
> * * * *
>
> "The complaint alleges both a 'custom' among Philadelphia police officers of violating the rights of epileptics, and the Police Department 'policy or custom' of failing to train police officers adequately. As to the first allegation (that the rights of epileptics are frequently violated by police): plaintiff has not alleged that the City or Police Department had an *official* policy to violate the constitutional rights of

> epileptics. However, required 'policy or custom' may be shown to be actual practice, regardless of whether it conformed to written requirements. . . . Thus the complaint states a cause of action against the City and the Philadelphia Police Department.
>
> ". . . The complaint does not specify what the City did or did not do in training and supervising its police officers; plaintiff admits that he needs further discovery on how Philadelphia police officers in general have dealt with epileptic members of the public. Plaintiff claims, however, that the allegations in Paragraph 41 of the Complaint that defendants exhibited 'a reckless disregard' of his rights, is sufficient to state a claim. The motion to dismiss the section 1983 claim against the City, Philadelphia Police Department and defendant [Police Commissioner] Sambor will be denied."

It is respectfully submitted that appellant's complaint is virtually identical to *Paul*. While the complaint does not specify what Upper Darby Township did or did not do in training and supervising its police officers since discovery is needed, the complaint does allege that appellees' "gross negligence" and "deliberate indifference to the safety and lives of individuals taken into custody and detained by defendants" was the cause of Ms. Stierheim's death. It is respectfully submitted that pursuant to *Paul,* these allegations should have been sufficient to overcome defendants' motion to dismiss the section 1983 claim against the police department at this early stage of the proceeding. Therefore, it is respectfully submitted that the district court erred in dismissing the appellant's complaint and its order should be reversed.

D. APPELLANT HAS PLEAD A CAUSE OF ACTION UNDER TITLE 42 U.S.C. SECTION 1983 AGAINST THE UPPER DARBY TOWNSHIP POLICE OFFICER-MATRON DIANE MILLER SUFFICIENT TO WITHSTAND APPELLEES' MOTION TO DISMISS.

It is well settled in the Third Circuit that actions of police officers are actionable under Title 42 U.S.C. Section 1983 if done under color of state law and deprive an individual of a right, privilege or immunity secured by the Constitution or laws of the United States. *Riley v. Jeffes*, supra.; *Baldi v. City of Philadelphia*, 609 F. Supp. 162, 164 (E.D. Pa. 1985); *Black v. Stephens*, supra., 662 F.2d at 188. *Jones v. Clark*, 607 F. Supp. 251, 254 (E.D. Pa. 1984) (summary judgment motion dismissed against defendant police captain for alleged deprivation of constitutional rights under section 1983, where plaintiff had established a deprivation of his fourteenth amendment rights through state action).

In *Baldi v. City of Philadelphia*, supra., individual police officer defendants were found liable under plaintiff's section 1983 complaint under the two-part test set forth above. District Judge VanArtsdalen held in pertinent part:

> "The state's duty to provide medical treatment arises because the state has control over a person's freedom and therefore assumes responsibility for the individual. Once the duty attaches, the individual under state control has a constitutional right to adequate medical care, the intentional deprivation of which is actionable through section 1983." *Id.*, 609 F. Supp. at 166.

In *Black v. Stephens*, supra., an undercover police detective was held liable in his official capacity to plaintiff where the evidence supported the conclusion that the police officer was acting under color of state law

at the time of the incident in question, and that he deprived plaintiff of his constitutional rights under the fourteenth amendment to be free from deprivation of his liberty interest. See also, *Gant v. Aliquippa Borough,* 612 F. Supp. 1139, 1142 (W.D. Pa. 1985) (holding that plaintiff, who alleged that a police officer directly and intentionally invaded her substantive constitutional right to be free from violence and injury by state's agents, had a right of action against the officer under section 1983.)[7]

The allegations of appellant's complaint relate specifically to the unconstitutional conduct, personal involvement and knowledge of police officer-matron Diane Miller in directly causing the suicide death of Ms. Stierheim, under color of state law. Accordingly, it is respectfully submitted that appellant's complaint has properly plead a cause of action against appellee police officer-matron Diane Miller under Count III of her complaint. Therefore, it is respectfully submitted that the order of the District Court dismissing appellant's action against appellee Miller be reversed.

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7. Indeed a variety of circuits have held that police officers, acting under color of state law, are proper party defendants in a section 1983 action. See *Jones v. City of Philadelphia,* 491 F. Supp. 284, 287 (E.D. Pa. 1980); *Durkin v. Bristol Township,* supra., (opinion by Chief Judge Lord); *Zynn v. O'Donnell;,* supra.; *Sims v. Adams,* supra., (cause of action allowed against members of two police committees); *Fiacco v. City of Rensselaer,* supra.; *Madden v. City of Meriden,* supra.; *Fundiller v. City of Cooper City,* supra.; and *Murray v. City of Chicago,* supra.

CONCLUSION

For this Court to endorse the summary disposition of this and other similar cases prior to even minimal discovery in effect will mandate that counsel allege as facts matters which are more accurately characterized as strong suspicions. Does counsel violate Federal Rule of Civil Procedure II or risk such summary disposition as occurred in this case?

The bar ought not to be faced with such a dilemma and accordingly, it is respectfully requested, based on the foregoing authority and arguments, that the District Court's dismissal of appellant's complaint be reversed, and that appellant be permitted to complete discovery and amend appellant's complaint, if necessary.

Respectfully submitted,

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BY:_____

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CERTIFICATE OF COUNSEL

It is hereby certified that the undersigned counsel are members in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

_____

Joseph R. Pozzuolo, Esquire

_____

Gary M. Perkiss, Esquire

IN THE EASTERN STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUE ANN COLBURN, Adm. of the Est. of Melinda Lee Stierheim, dec.	:	CIVIL ACTION
v.	:	
UPPER DARBY TOWNSHIP, et al.	:	NO. 86-2132

FINAL ORDER

AND NOW, this 7th day of October, 1986, upon consideration of plaintiff's motion for reconsideration pursuant to Fed. R. Civ. P. 59, it is hereby ORDERED that plaintiff's motion is DENIED without prejudice to any state cause of action plaintiff may have for the following reasons:

1. Plaintiff contends that this court did not rule on the merits of her claim, but rather, dismissed the action improvidently because the court wrongfully believed that she had failed to respond timely. I did approve plaintiff's stipulation extending her time to respond to defendant's Rule 12(b)(6) motion. However, such stipulation crossed paths with the motion at the same time defendants' motion ripened and hence, I believed that a notation regarding a lack of opposition was appropriate. While the word "unopposed" was handwritten by me on defendants'-proposed order, it did not appear without qualifying language. I did review the merits of defendants' motion. Finding the merits of defendants' motion persuasive, I ruled in their favor "for the reasons stated [in their motion]" and dismissed plaintiff's claim.

2. Under plaintiff's current complaint, police officer-matron Diane Miller is alleged to have "negligently, carelessly and recklessly" failed to search adequately decedent's person before she was detained in a

holding cell. Compl. at ¶17. The poor search techniques used by officer Miller are alleged to rise to the level of plaintiff's decedent's constitutional injury. That is, Miller's failure to detect a handgun on decedent's person was the cause of her suicide. The remaining defendants are alleged to have "exhibited a custom of laxity" regarding the supervision and oversight of (1) strip search techniques (both training and in application) and (2) activity of potentially dangerous detainees within jail cells.

3. Officer Miller's failure to detect a handgun, even if it *was* located on decedent's person at the time of the frisk, does not rise to the level of a constitutional deprivation. Plaintiff has failed to suggest where the gun may have been located, whether plaintiff actually had the weapon on her person while she was searched or whether the officer had a reasonable suspicion that decedent was likely to be carrying a weapon. The facts as stated lack sufficient specificity to tie together the allegedly inadequate frisk and the subsequent suicide. "[A]n error in judgment, an unforeseeable tragic event, a good faith but misinformed professional decision, or mere negligence will not suffice to impose liability under §1983." *See Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 508 (3d Cir. 1985).

Moreover, Officer Miller is alleged to be part of the Upper Darby Police Force. She was clearly acting in her official capacity according to standard police procedure. This fact is unchallenged. Each member of the force is alleged to have "exhibited a custom of laxity" in the oversight of detainees. A custom is not an official policy. Therefore, in order to show that the entity is liable under section 1983, plaintiff must establish an official practice of city officials so permanent and well-settled so as to have the force of law. *Monell v. New York City, Department of Social Services*, 436 U.S. 658, 691 (1978). A conclusory allegation that a municipal police force is lax in carrying out its duties is the exact type of negligent

behavior the Supreme Court intended to exclude from the scope of section 1983 when it affirmed *Davidson v. O'Lone*, 752 F.2d 817, 828, 828 n.8 (3d Cir. 1984) (in banc), *aff'd sub nom. Davidson v. Cannon*, 106 S. Ct. 668 (1986). Further, the municipality's liability is limited to action for which it is *actually* responsible. *See City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). The extension of municipal liability to cover unforeseeable and tragic events caused directly by the superseding actions of a third party is beyond the realm of cognizable section 1983 violations.

4. Finally, plaintiff's section 1983 claim is based upon the eighth and fourteenth amendments. The eighth amendment protects *convicted prisoners* against cruel and unusual punishment. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). In the case before me, plaintiff was only under arrest when the alleged constitutional conduct occurred. She was not convicted of any crime. In fact, defendants appear to have taken her in in order to protect her. If so, does tort law protect her if they fail to exercise reasonable care in assuming such a duty? Accordingly, the eighth amendment is not available as a source of protection. In order to succeed, plaintiff must find another source of constitutional protection to state a claim under section 1983. Although the fourteenth amendment has been recognized in this circuit as a source of *protection for detainees*, the court noted that when a plaintiff receives some medical care, the alleged inadequacy of such caree will not support an eighth or a fourteenth amendment claim. *See Norris v. Frame*, 583 F.2d 1183, 1186 (3d Cir. 1979).

BY THE COURT:

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J.

CERTIFICATE OF SERVICE

I Gary M. Perkiss, Esquire, hereby certify that a true and correct copy of Appellant's Brief was served on the following counsel of record by first-class mail, postage prepaid on January 9, 1987:

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